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Smoking Out Big Tobacco: Some Lessons About Academic Freedom, The World Wide Web, Media Conglomeration, and Public Service Pedagogy from the Battle Over the Brown & Williamson Documents

Clay Calvert*

In May 1994, a box of documents arrived mysteriously, unsolicited, and without a return address at the office of Dr. Stanton A. Glantz, Professor of Medicine at the University of California, San Francisco (UCSF).¹ Its contents ultimately provided powerful evidence for

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1. Bill Kisliuk, *Mystery Tobacco Papers Fuel Litigation*, LEGAL TIMES, May 29, 1995, at 2. The Federal Express package identified the sender of the documents only as Mr. Butts. *Id.* Mr. Butts is a character in the *Doonesbury* cartoon strip—"a smooth-talking lobbyist with the body of a cigarette." Dave Thom, *Tobacco Company Loses Bid to Suppress Papers*, RECORDER (S.F.), May 26, 1995, at 3. The cartoon character "serves as an irony-free public relations flack for the tobacco industry." Kisliuk, *supra*, at 2.

Copies of the documents, allegedly stolen by a paralegal at a law firm that represented Brown & Williamson Tobacco Corp., were also sent to members of Congress. *See* Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 412 (D.C. Cir. 1995). Brown & Williamson's attorney, Kenneth W. Starr, lost an effort to compel production of these documents from Congressman Henry A. Waxman, Chairman of the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, and Representative Ron Wyden. *Id.* at 423. In that case, the Speech or Debate Clause of the United States Constitution prevented production of the documents. *Id.* The federal appellate court observed that Brown & Williamson's claim "is to a right to engage in a broad scale discovery of documents in a congressional file that comes from third parties," however, "[t]he Speech or Debate Clause bars that claim." *Id.* The Clause provides that "for any Speech or Debate in either

Glantz's damning conclusions against the tobacco industry in his controversial 1996 book, *The Cigarette Papers*.²

Glantz, a longtime anti-smoking advocate, and his four co-authors determined, after exhaustive review of the box's documents, that one of the nation's largest cigarette manufacturers, Brown & Williamson Tobacco Corp.,³ knew for more than thirty years that cigarettes are addictive and that they cause disease.⁴ Furthermore, the company took active measures to suppress this knowledge and engaged in numerous legal, advertising, and public relations efforts to obfuscate the dangers of smoking.⁵ The documents, and the conclusions drawn from them, add more fuel to the roaring, Food and Drug Administration (FDA)-stoked fire against the tobacco industry.⁶

House, [members of Congress] shall not be questioned in any other place." U.S. CONST. art. I, § 6, cl. 1. A complete discussion of the discovery issue in *Brown & Williamson Tobacco Corp. v. Williams* is beyond the scope of this Article.

2. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996). More than 20 major publishing houses turned the book down, fearful of legal liability, before the University of California Press picked it up. Lisa M. Krieger, *Crusader: UCSF Researcher Stanton Glantz's One-Man War Against Big Tobacco*, S.F. EXAMINER MAG., June 2, 1996, at 8, 10. In his foreword to the book, former United States Surgeon General C. Everett Koop calls *The Cigarette Papers* "a vital weapon in the battle against tobacco." C. Everett Koop, *Foreword to GLANTZ ET AL., supra*, at xv. "I do not believe that anyone who reads it can remain passive in the struggle against tobacco." *Id.* One reviewer of the book observed that it is difficult to read it "without wondering how the government has so conspicuously, and for so long, failed to grasp the nettle of cigarettes." Paul Reidinger, *Smoke and Mirrors*, 82 A.B.A. J. 104 (1996).

3. Brown & Williamson Tobacco Corp., a unit of London-based B.A.T. Industries PLC with its principal place of business in Louisville, Kentucky, is the nation's third largest tobacco company. Suein L. Hwang & Milo Geyelin, *Getting Personal: Brown & Williamson Has 500-Page Dossier Attacking Chief Critic*, WALL ST. J., Feb. 1, 1996, at A1. Tobacco is a \$45 billion industry. Alix M. Freedman et al., *Tort TV: CBS Legal Guarantees To '60 Minutes' Source Muddy Tobacco Story*, WALL ST. J., Nov. 16, 1995, at A1. Today, "for the first time since the early 1960s, America's cigarette market has stopped shrinking." *Still Smokin': Improbably, Tobacco Companies Are Far From Finished*, ECONOMIST, Mar. 11, 1995, at 61 [hereinafter *Still Smokin'*]. In 1994, Brown & Williamson held an 11.3% share of the cigarette market. *Id.* at 62.

4. GLANTZ ET AL., *supra* note 2, at 13. The Brown & Williamson documents can be accessed for free on the Web at <<http://www.library.ucsf.edu/tobacco/bw.html>>.

5. GLANTZ ET AL., *supra* note 2.

6. See generally Jeffrey Goldberg, *Next Target: Nicotine*, N.Y. TIMES MAG., Aug. 4, 1996, at 22, 24 (describing the work of David A. Kessler, Commissioner of the FDA, in "his Clinton-anointed role as Public Enemy No. 1 of Big Tobacco").

The government's war against the tobacco industry heated up in August, 1996, when President Bill Clinton approved a new set of stringent FDA regulations targeting billboards, signs, and print advertisements for cigarettes. Stephen Barr & Martha M. Hamilton, *Clinton Curtails Tobacco Ads in Bid to Cut Sales to Youth*, WASH. POST, Aug. 24, 1996, at A1. The regulations, aimed at reducing teenage smoking, ban billboard advertising of tobacco products within 1000 feet of a school or playground, limit print advertisements in publications with significant youth readership to a black-

and-white, text-only format, and prohibit brand-name sponsorship of sporting events. *Id.*; Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, N.Y. TIMES, Aug. 24, 1996, at 1, 8. The restrictions on commercial speech raise new and complex First Amendment issues. Rajiv Chandrasekaran, *FDA's Tobacco Ad Rules Face Lengthy Court Challenge*, WASH. POST, Aug. 24, 1996, at A9; Barnaby J. Feder, *Long Legal Fight Seen Likely Over New Curbs on Tobacco*, N.Y. TIMES, Aug. 24, 1996, at 8. A discussion of these First Amendment-related issues, however, is beyond the scope of this Article. For more information on this issue, see generally Daniel Helberg, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising under the Commercial Speech Doctrine*, 29 LOY. L.A. L. REV. 1219 (1996).

In addition to heat from the federal government, states' attorneys general have applied increasing pressure to the tobacco industry. In August 1996, Oklahoma became the fourteenth state to sue tobacco companies on fraud-based theories to recover health care and Medicaid costs for illnesses caused by tobacco industry products. *Oklahoma Sues Tobacco Firms*, WASH. POST, Aug. 24, 1996, at A8. The tobacco industry often places intense pressure on states' attorneys general not to file such lawsuits. John Schwartz, *Tobacco Industry Lawyers Press State Attorneys General Not to Sue*, WASH. POST, May 1, 1996, at A1.

San Francisco became the first city to sue the tobacco industry for recovery of health care-related costs in early June 1996. Reynolds Holding, *S.F. Becomes First City to Sue Tobacco Firms*, S.F. CHRON., June 7, 1996, at A1. The San Francisco lawsuit alleges that six tobacco companies, including Brown & Williamson Tobacco Corp., lied about the dangers of smoking and intentionally concealed the results of research harmful to the cigarette industry. *Id.*

In August 1996, Brown & Williamson Tobacco Corp. lost a \$750,000 jury verdict in a Florida case brought by a man who developed lung cancer after smoking for 43 years. Suein L. Hwang et al., *Jury's Tobacco Verdict Suggests Tough Times Ahead for the Industry*, WALL ST. J., Aug. 12, 1996, at A1.

Currently, the tobacco industry faces a deluge of litigation on all fronts. As Morton Mintz wrote in late 1995, "Each week in Washington seems to bring a new anti-smoking challenge." Morton Mintz, *Where There's Smoke*, WASH. POST MAG., Dec. 3, 1995, at W20.

Common theories of relief used by states' attorneys general and personal injury attorneys include fraud, negligent misrepresentation, emotional distress, negligence, violation of consumer protection statutes, breach of express and implied warranties, strict liability (failure to warn as well as defective design and manufacturing theories), conspiracy, and unjust enrichment. Richard A. Daynard & Graham E. Kelder, *The Tobacco Industry Under Fire*, TRIAL, Nov. 1995, at 20, 22.

In late summer of 1996, Congress proposed to states' attorneys general and to tobacco companies a deal that largely would end tobacco litigation. David Segal, *Plan to End Lawsuits Could Snuff Out Tobacco's Army*, WASH. POST, Sept. 2, 1996, at F7. Richard Scruggs, a Mississippi attorney and long-time foe of cigarette makers, drafted the proposal. *Id.* United States Senator Trent Lott (R-Miss.) is Scruggs's brother-in-law. *Id.*

One cigarette manufacturer, Liggett Group, Inc., broke from the ranks of its colleagues in 1996 by offering to settle a class-action lawsuit filed against it. Lorraine Woellert, *Tobacco Giants Refuse to Follow Liggett Offer*, WASH. TIMES, Mar. 14, 1996,

Given the explosive, revealing nature of the documents⁷ it is not surprising that a fierce legal battle ensued between the University of California and Brown & Williamson over their retention and dissemination.⁸ Approximately 4000 copies of Brown & Williamson internal memoranda and correspondence between company lawyers, many labeled "confidential" or "privileged" and dating from the 1950s through the 1980s, were allegedly stolen.⁹ This Article analyzes the legal fight over those documents and its free speech implications. Moreover, it contrasts the bold course taken by UCSF with that of two major broadcast news organizations, ABC and CBS, in their recent run-ins with the tobacco industry.

Brown & Williamson claimed the documents were privileged and stolen by a former paralegal employed by one of its law firms.¹⁰ The cigarette manufacturer feared, correctly, that personal injury plaintiffs and state governments suing the company would make end-runs around established discovery procedures to obtain the documents.¹¹ Plaintiffs could simply access the documents at the UCSF Archive Library or on UCSF's World Wide Web home page. This access avoids traditional requests for production of documents and near-certain discovery disputes over attorney-client privilege, work product doctrine, and trade secret status.¹²

at B7. However, Liggett is the smallest of the nation's five major tobacco companies, and the larger companies have not followed its lead. *Id.*

7. The documents have been described as "a potential smoking gun that could shape four multimillion-dollar cases filed against the tobacco companies." Kisliuk, *supra* note 1, at 2.

8. *Brown & Williamson Tobacco Corp. v. Regents of Univ. of Cal.*, No. 967298 (Super. Ct. Cal. S.F. County dismissed Feb. 7, 1996).

9. Kisliuk, *supra* note 1, at 6.

10. *Id.* at 2.

11. *Id.* At the time of the dispute in *Regents of University of California*, Florida, Minnesota, Mississippi, and West Virginia had filed suits against the tobacco industry alleging causes of action for unjust enrichment, fraud, conspiracy, and negligence. Amici Curiae Brief of the Attorney Generals of Florida, Minnesota, Mississippi, and West Virginia at 1, *Regents of Univ. of Cal.* (No. 967298).

12. The fears of counsel for Brown & Williamson were apparently borne out. In particular, Brown & Williamson alleged with Glantz's deposition that Glantz provided a copy of the documents to plaintiffs' counsel in the well-publicized federal class-action lawsuit, *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996). Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 3, *Regents of Univ. of Cal.* (No. 967298). The appellate court decertified the class in *Castano* on May 23, 1996. *Castano*, 84 F.3d at 734.

Brown & Williamson, although maintaining that the attorney-client privilege and work product doctrine protected the documents, eventually abandoned its claim that the documents contained trade secrets. Memorandum of Points and Authorities in Opposition to Application for Writ of Possession and Preliminary Injunction at 11 n.4,

The University of California, on the other hand, invoked the First Amendment¹³ to retain possession of the documents, arguing that the papers were of "enormous public and academic interest and importance" and that providing scientists, historians, and members of the general public with library and Internet access to them was essential.¹⁴ The University took the position that an order forbidding UCSF from publishing or disseminating the documents would be a prior restraint on speech.¹⁵

The University also claimed the documents were part of the public domain, already "in the hands of many of the nation's major news organizations and . . . the subject of numerous news reports that have disclosed their contents."¹⁶ Brown & Williamson's legal maneuvering to

Regents of Univ. of Cal. (No. 967298).

13. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local governments. U.S. CONST. amend. XIV; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

14. Opposition to Motion to Compel at 1, *Regents of Univ. of Cal.* (No. 967298).

15. A prior restraint on speech, as compared to a subsequent punishment for speech already communicated, is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The United States Supreme Court has held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Prior restraints generally take the form of either administrative schemes for the licensing and prescreening of speech or judicial prohibitions against publication such as injunctions and gag orders. MARC A. FRANKLIN & DAVID A. ANDERSON, *CASES AND MATERIALS ON MASS MEDIA LAW* 78-80 (5th ed. 1995). An injunction "is a writ or order requiring a person to refrain from a particular act." CAL. CIV. PROC. CODE § 525 (West 1979). See generally Kelli L. Sager et al., *Prior Restraint in the 90s: Twenty-Five Years After the Pentagon Papers*, in 1 LITIGATING LIBEL AND PRIVACY SUITS 517 (1996) (providing a thumbnail review of recent prior restraint cases).

16. Opposition to Motion to Compel at 2, *Regents of Univ. of Cal.* (No. 967298). As the American Heart Association, American Cancer Society, and other related heart-and-lung organizations stated in their memorandum of amici curiae in *Regents of University of California*:

Beginning on May 7, 1994 the content of these documents have [sic] been discussed in almost every major newspaper in the United States. The *New York Times* ran lengthy stories on May 7, 1994, June 16, 1994 and June 17, 1994. The *Washington Post* ran the first of its stories on these documents on May 14, 1994. The *Los Angeles Times* ran stories on these documents in both May and August of 1994. *Businessweek* devoted an entire page to these docu-

recover the documents amounted, the University contended, to a Strategic Lawsuits Against Public Participation (SLAPP) suit designed to suppress informed public dialogue about the dangers of smoking.¹⁷

The ensuing battle was not a typical First Amendment case. The dispute between the cigarette manufacturer and the academic institution did not involve a "traditional" media defendant. Neither a journalist nor a newspaper nor television network was involved. The case also did not feature a cause of action, such as libel¹⁸ or invasion of privacy,¹⁹ typically found in media defamation cases.²⁰

ments and they have been covered at length by newspapers from Boston to Dallas. ABC News' magazine show "Day One" devoted an entire segment to the content of these documents.

Memorandum of Amici Curiae on Plaintiff's Motion for Preliminary Injunction at 11, *Regents of Univ. of Cal.* (No. 967298).

17. Memorandum of Points and Authorities in Support of Defendant's Special Motion to Strike Complaint at 1, *Regents of Univ. of Cal.* (No. 967298). SLAPP is an acronym for Strategic Lawsuits Against Public Participation. Robert D. Richards, *Suing to Squelch: A New Way to Keep Activists Quiet*, WASH. POST, Aug. 16, 1992, at C1. Two University of Denver professors created the term less than a decade ago. Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

18. The Restatement of Torts defines libel as "the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568 (1977). Libel typically involves the written, pictorial, or broadcast form of defamation. Robert D. Sack, *Common Law Libel and the Press: A Primer*, in COMMUNICATIONS LAW 35, 123-24 (1993). *But see* CAL. CIV. CODE § 46 (West 1994) (providing that slander includes defamation by "radio or any mechanical or other means").

19. The four basic privacy torts, as originally categorized in an influential law journal article by tort scholar William L. Prosser, are intrusion into seclusion, false light, public disclosure of private facts, and appropriation. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). The privacy torts are distinct from the federal constitutional right to privacy recognized by the United States Supreme Court. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding an unenumerated constitutional right to privacy in the penumbras of a number of specific guarantees in the Bill of Rights).

20. It may be somewhat misleading today to describe a typical cause of action against a media defendant. Plaintiffs' attorneys now assert numerous causes of action to avoid, or to make an end-run around, the high wall of constitutional protection that now protects media defendants in libel actions. As David Kohler, deputy general counsel for Turner Broadcasting System, Inc., observed, "today, in addition to the more common claims of defamation and invasion of privacy that have relatively well-developed First Amendment limitations, we increasingly see suits alleging trespass, breach of contract, infliction of emotional distress, unfair trade practices and even racketeering." David Kohler, *Blame the Laws, Mr. Wallace, Not the Lawyers*, WALL ST. J., Nov. 21, 1995, at A16. *See generally* *Baugh v. CBS*, 828 F. Supp. 745 (N.D. Cal. 1993) (addressing complaint for nontraditional causes of action related to a media defendant's behavior such as intentional infliction of emotional distress, negligent

The case raises, however, a wide range of issues with important First Amendment implications. Questions stretch from the scope of academic freedom under the First Amendment to the use of the graphics-rich World Wide Web (Web) as a strategic litigation weapon to defeat discovery and evidentiary privileges and to influence the direction of lawsuits. Specifically, the First Amendment-related issues addressed in the first part of this Article include:

(1) Application of heightened First Amendment scrutiny to generally applicable state laws, including writs of possession and conversion,²¹ that do *not*, on their face, regulate or target speech;²²

(2) Use of SLAPP suits to stifle public debate on issues such as the dangers of smoking;²³ and

(3) Use of Internet and World Wide Web technologies to disseminate allegedly stolen and privileged information in order to influence pending litigation.²⁴

This Article goes beyond analysis of the legal and public policy issues in *Brown & Williamson Tobacco Corp. v. Regents of University of California*.²⁵ It draws a stark contrast between the response of the University of California, the cradle of the 1960s free speech movement at its Berkeley campus, and the actions of two television networks, ABC and CBS, in their recent battles against Big Tobacco.²⁶ While the television networks caved under legal and economic pressures,²⁷ a ma-

infliction of emotional distress, fraud, trespass, and unlawful business practices).

21. Conversion, under California law, is a strict liability tort that "protects against interference with possessory and ownership interests in personal property." Moore v. Regents of Univ. of Cal., 793 P.2d 479, 487 (Cal. 1990).

22. See *infra* Part I.B.1.

23. See *infra* Part I.B.2.

24. See *infra* Part I.B.3.

25. *Brown & Williamson Tobacco Corp. v. Regents of Univ. of Cal.*, No. 967298 (Cal. Super. Ct. S.F. County dismissed Feb. 7, 1996).

26. See *Philip Morris Cos. v. ABC*, 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995) (discussing discovery dispute over confidential sources in defamation action filed by Philip Morris against ABC that the network later settled out of court); Lawrence K. Grossman, *CBS, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan.-Feb. 1996, at 39 (discussing CBS's decision not to run a *60 Minutes* expose critical of the tobacco industry).

27. See generally Bill Carter, *Dispute Erupts at '60 Minutes' Over Canceling of Interview*, N.Y. TIMES, Nov. 18, 1995, at A10 (describing the controversy created in November 1995, when the CBS television newsmagazine *60 Minutes* pulled from its schedule an interview with a whistle-blowing former employee of Brown & Williamson Tobacco Corp. for fear of legal liability); Steve Weinberg, *Smoking Guns: ABC,*

jor public university flexed its muscles, stood its ground, and ultimately claimed victory against an extremely powerful player in the cigarette industry.²⁸

Drawing from communication research on media ownership and influences, as well as from a growing body of literature on pedagogy and service learning, this Article questions whether, in an era of increasing consolidation, concentration, and cross-pollination of media ownership,²⁹ an era in which bottom-line dollars matter most, the public will be left to rely on universities rather than traditional news media for information about important matters of public concern.³⁰ Research universities are established centers for the discovery and advancement of knowledge and, increasingly, hubs for public service and service learning. Without the publicity provided by major media outlets, however, knowledge is destined to remain closeted in obscure and often inaccessible academic journals.

Part I of this Article, drawing from pleadings, points and authorities, and court transcripts, analyzes *Brown & Williamson Tobacco Corp. v. Regents of University of California*.³¹ It describes the facts of the case and its First Amendment-related issues, arguments, and conclusions.

Part II contrasts the tack of the University of California in its battle against Brown & Williamson with that of ABC against cigarette giant Philip Morris Co., Inc.³² and CBS against Brown & Williamson.³³ It

Philip Morris and the Infamous Apology, COLUM. JOURNALISM REV., Nov.-Dec. 1995, at 29-37 (providing a review of the events and circumstances surrounding ABC's 1995 capitulation to Philip Morris in a defamation action brought by the cigarette manufacturer against the network for two *Day One* broadcasts about the processes of nicotine manipulation and reconstitution).

28. After Brown & Williamson lost at the superior court level, the California Supreme Court denied its application for stay of that order and its petition for review. Dave Thom, *Tobacco Company Loses Bid to Suppress Damaging Documents*, RECORD-ER (S.F.), June 30, 1995, at 4. In early 1996, pursuant to a joint stipulation and request by both parties, Judge Stuart R. Pollak of San Francisco County Superior Court ordered the case dismissed without prejudice. Joint Stipulation and Request for Dismissal and Order of Dismissal at 3, *Regents of Univ. of Cal.* (No. 967298). The dismissal order states, however, that Brown & Williamson is not waiving any attorney-client or work product privileges that may apply to the same documents in other cases. *Id.*

29. See generally BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (4th ed. 1992) (providing a detailed analysis of the growing concentration of ownership of media operations); Bill Carter, *In a Far-Flung Empire, Some Winners Some Losers and Works in Progress: Fox TV Raises Concern*, N.Y. TIMES, July 29, 1996, at D9 (providing a breakdown of the current assets and wealth of mega-media businesses including Walt Disney Co., Time Warner, Viacom, and News Corporation).

30. See *infra* notes 309-94 and accompanying text.

31. See *infra* Part I.A.-B.

32. Philip Morris, the nation's largest cigarette and tobacco products company, con-

analyzes the growing trend of media conglomeration and the self-censorship dangers it poses for investigative journalism.

Part II also suggests, somewhat ominously perhaps, that the public may be forced to rely on university-sponsored journalism projects and university news services, not on traditional broadcast media outlets such as television news organizations, for the investigation and dissemination of information about some controversial matters of public concern. This action-service role for the professors and students housed in journalism and communication departments provides a natural bridge across a holy trinity of university goals of teaching, research, and service, while allowing universities to fulfill their mission of public service to local communities and the nation.³⁴ Bottom-line economic pressures on mega-media corporations are becoming too great to place blanket trust in traditional news organizations for all the news that is fit to print.³⁵ Alternatives must be found.

Part III concludes that *Regents of University of California* was a major victory for academic and intellectual freedom and for plaintiffs involved in litigation against the tobacco industry.³⁶ A growing cowardice in the face of legal liability, however, mitigates its importance for the press.³⁷ In brief, even if the press could legally disseminate material like that in *Regents of University of California*, the question still

trolled 44.8% of the United States' cigarette market in 1994. *Still Smokin'*, *supra* note 3, at 61-62.

33. See *infra* Part II.

34. For an excellent analysis of whether community and public service actually enhances a university's academic mission or whether these are simply misplaced efforts to help heal sagging social conscience, see Jeremy Cohen, *Matching University Mission With Service Motivation: Do the Accomplishments of Community Service Match the Claims?*, 1 MICH. J. COMMUNITY SERVICE LEARNING 98 (1994).

35. Sociologist Todd Gitlin, observing the negative effects of concentration and conglomeration in the newspaper industry, stated that "[c]hains, especially those that trade on the stock market, are more eager than single-paper proprietors to raise profit margins. They tend to cut costs by firing reporters and editors. As the number of newspapers in a chain goes up, the size of the newshole tends to shrink." Todd Gitlin, *Not So Fast*, MEDIA STUD. J., Spring-Summer 1996, at 1, 4-5. Gitlin stated that the potential for harm from the growing concentration of ownership "is at least as impressive as the potential for good." *Id.* at 6.

36. See *infra* notes 395-96 and accompanying text.

37. Stanford University law professor Robert Rabin observed that the availability of the Brown & Williamson documents provides plaintiffs' attorneys with powerful new evidence to show juries and could "change the landscape" of products liability litigation against cigarette manufacturers. Harriet Chiang, *Suit Says Tobacco Firms Lied*, S.F. CHRON., July 26, 1996, at A21.

arises whether it nonetheless would refrain from publishing the material for fear of a potential defamation³⁸ action. A new role for universities in filling the information void left by broadcast news media must therefore be considered.

I. *BROWN & WILLIAMSON TOBACCO CORP. V. REGENTS OF
UNIVERSITY OF CALIFORNIA*

A. *Factual Background*

Brown & Williamson's legal woes against UCSF began with the actions of a disgruntled paralegal, Merrell Williams.³⁹ Williams worked for the law firm Wyatt, Tarrant & Combs in Louisville, Kentucky, from 1988 through part of 1992.⁴⁰ The firm was outside counsel for Brown & Williamson in product liability lawsuits filed against the cigarette manufacturer.⁴¹

During his time at Wyatt, Williams worked on confidential litigation-related document production and review for Brown & Williamson.⁴² He has described this work as "not just protecting, but perpetuating some kind of method of dealing with, if not murder, certainly a kind of deviousness that would cause people great damage."⁴³ Williams and other paralegals reviewing documents, however, signed agreements not to disclose what they learned.⁴⁴

38. Defamation is the general term that includes both the libel and slander torts. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984).

39. See Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 2, *Regents of Univ. of Cal.* (No. 967298) (stating that "an expert examiner of documents formerly with the [Federal Bureau of Investigation] . . . determined that the [d]ocuments [sent to Glantz] originated from the original copies made by [Merrell] Williams").

40. Kisliuk, *supra* note 1, at 2. Prior to working as a paralegal, Williams, who holds a Ph.D. from the University of Mississippi, was a professor of drama. PHILIP J. HILTS, SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP 130-31 (1996). Williams taught drama and writing on a part-time basis at Jackson State University in Mississippi. *Id.* at 131.

41. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 411 (D.C. Cir. 1995).

42. *Id.* Williams's job was to analyze and classify documents selected by attorneys for Brown & Williamson as significant in its defense in pending products liability litigation. Ex Parte Application and Memorandum of Points and Authorities in Support of Ex Parte Application to Enforce Court Order and for a Protective Order Limiting Discovery at 4 n.3, *Regents of Univ. of Cal.* (No. 967298). The firm trained Williams "concerning the issues in the tobacco product liability litigation, including B & W's attorneys' legal theories, opinions, and conclusions regarding defense strategies." *Id.*

43. HILTS, *supra* note 40, at 132.

44. *Id.* at 136.

Before undergoing heart surgery and a quintuple bypass in 1993,⁴⁵ Williams, a smoker of Brown & Williamson-manufactured Kool cigarettes for twenty-five years, "devoted more than four years to reading the company's files" and became "concerned that he was helping hide a conspiracy to defraud the public."⁴⁶ Williams decided to copy documents because, as he stated, "I had to do something. . . . And because otherwise there is no proof. . . . There just is no proof."⁴⁷ Describing the copying process, Williams said that he would go to work "at 5:30 in the morning, or on Saturdays. . . . I would pick the times, or I would hear of documents that sounded very interesting to me. . . . I would go by the person's desk and eye it, get the number on the box, and come back."⁴⁸

About one year after leaving Wyatt,⁴⁹ Williams told the firm "that he had made copies of various [Brown & Williamson] documents to which he had had access."⁵⁰ As counsel for Brown & Williamson bluntly wrote in papers filed in *Regents of University of California*, Williams "photocopied and then stole thousands of B & W's privileged documents."⁵¹ Those documents would be at the heart of the dispute with UCSF.

On May 12, 1994, Professor Stanton A. Glantz of the University of California, San Francisco, received an unsolicited and anonymous box of documents at his office.⁵² The documents, according to Glantz, were

45. *Id.* at 130-32.

46. Krieger, *supra* note 2, at 32.

47. HILTS, *supra* note 40, at 133.

48. *Id.* at 34.

49. According to documents filed in the cigarette manufacturer's suit against the University of California, "Williams was laid off from his job as a paralegal for B & W's outside law firm in 1992, with a two-week notice." Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 1, *Regents of Univ. of Cal.* (No. 967298).

50. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 411 (D.C. Cir. 1995).

51. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 1-2, *Regents of Univ. of Cal.* (No. 967298).

52. Memorandum of Points and Authorities in Opposition to Application for Writ of Possession and Preliminary Injunction at 4, *Regents of Univ. of Cal.* (No. 967298). In a new book by *New York Times* reporter Philip J. Hilts, Glantz along with others such as David Kessler, Commissioner of the FDA, is described as one of the seven heroes of the current anti-tobacco campaign. HILTS, *supra* note 40, at 52.

"an intellectual candy store."⁵³ He compared reading them to "reading the real Hitler diaries."⁵⁴

The documents, according to legal papers filed by the University of California,

reveal that secret B & W and industry research demonstrated the health hazards of cigarettes and the addictive properties of nicotine many years before they were publicly known. They show that B & W and the rest of the industry misled the public and health authorities about the health effects of smoking, about their own research efforts, and that for years B & W publicly denied what its own internal research was showing. They also show that B & W attorneys implemented a strategy to suppress these results by laundering potentially harmful information through attorneys to enable them to assert privileges over them.⁵⁵

Glantz made several sets of copies of the documents, placing one set in the UCSF library's "Tobacco Control Archive" during the summer of 1994.⁵⁶ According to the University, "the documents were open to the public and scholars for inspection, and were inspected and copied by a number of persons."⁵⁷ They attracted so much attention that the University created a waiting list for visitors.⁵⁸

Brown & Williamson learned that UCSF had a copy of the documents from briefs filed by plaintiffs' counsel in products liability litigation against the company in other jurisdictions.⁵⁹ Representatives of the tobacco company completed a review of the documents at UCSF on February 1, 1995, and they allegedly determined that the papers were subject to the attorney-client privilege and work product doctrine.⁶⁰

Although Glantz professed ignorance of the documents' sender, Brown & Williamson linked them directly back to the departed paralegal, Williams. The tobacco company alleged that "the [d]ocuments traveled from B&W's outside counsel to the library at UCSF by theft."⁶¹ As it later told

53. Krieger, *supra* note 2, at 28.

54. *Id.*

55. Memorandum of Points and Authorities in Opposition to Application for Writ of Possession and Preliminary Injunction at 4, *Regents of Univ. of Cal.* (No. 967298) (citations omitted).

56. *Id.* at 5. Glantz placed the documents in the Archive because of their "public and academic importance." *Id.*

57. *Id.* at 6.

58. Krieger, *supra* note 2, at 32.

59. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 4, *Regents of Univ. of Cal.* (No. 967298).

60. Memorandum of Points and Authorities in Support of Application for: (1) Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction; (2) the Appointment of a Receiver; and (3) an Order Requiring the Turnover of Library Records at 4, *Regents of Univ. of Cal.* (No. 967298).

61. *Id.* In ruling on Brown & Williamson's motion for a writ of possession and turnover of the documents, San Francisco County Superior Court Judge Stuart R. Pollak assumed, for the sake of argument, that the documents "were removed from

the superior court in *Regents of University of California*, "All that is at issue in this case are documents and information stolen by a former paralegal who was employed to defend B & W in pending litigation."⁶²

On February 14, 1995, Brown & Williamson filed a complaint against the University of California seeking immediate recovery of the cigarette documents and alleging that it owned the documents at UCSF's library.⁶³ Brown & Williamson contended that the University's possession of the allegedly privileged documents constituted conversion under California law.⁶⁴ The tobacco company also sought a temporary restraining order and preliminary injunction preventing the public and anyone other than counsel for Brown & Williamson from gaining access to the documents in UCSF's library until resolution of its request for their return.⁶⁵ In addition, the tobacco company requested an order to require the University to turn over its library records in an effort to discover the identity of all individuals who inspected the documents.⁶⁶

Judge Stuart R. Pollak of the Superior Court of California, County of San Francisco, immediately granted a temporary restraining order, which required placement of the documents "in a secure locked vault, safe or room where access is limited to counsel for the University and counsel for Brown and Williamson," and remained in effect throughout the litigation of other issues.⁶⁷ Those issues, as well as other public policy questions suggested by the facts in *Regents of University of California*, are addressed below.

the possession of Brown & Williamson's attorneys by Mr. Williams, and those documents, removed without authority by Mr. Williams, are the source of the documents which found their way into the hands of the University." Court Transcript of May 25, 1995 Hearing at 7, *Regents of Univ. of Cal.* (No. 967298).

62. Ex Parte Application and Memorandum of Points and Authorities in Support of Ex Parte Application to Enforce Court Order and for a Protective Order Limiting Discovery at 4, *Regents of Univ. of Cal.* (No. 967298).

63. Complaint for Specific Recovery of Personal Property and Declaratory Relief, *Regents of Univ. of Cal.* (No. 967298).

64. *Id.* at 3.

65. *Id.* at 4.

66. *Id.* at 3-4.

67. Order to Show Cause and Temporary Restraining Order, *Regents of Univ. of Cal.* (No. 967298).

B. Issues and Arguments

This section concentrates on three legal and public policy issues raised in *Regents of University of California*. Each carries important First Amendment implications.

1. Applying First Amendment Scrutiny to Generally Applicable State Laws that do not Regulate Speech

The return of the documents to Brown & Williamson pivoted on the validity of its cause of action for conversion under California law. To obtain a writ of possession⁶⁸ for the documents, the cigarette manufacturer first needed to establish the "probable validity" of its conversion claim.⁶⁹

The basic elements of conversion are (1) the plaintiff's right to possess the property in question at the time of the alleged conversion, (2) a wrongful act or disposition of the property by the defendant, and (3) damages.⁷⁰ Under California law, "[t]he gravamen of the tort of conversion is the *deprivation* of the possession or use of one's property."⁷¹ To constitute deprivation, actual interference with the property must be substantial.⁷²

Invoking the common conversion remedy of "[s]pecific recovery of the property, with damages for its detention,"⁷³ Brown & Williamson sought the return of its documents from UCSF and all other copies that UCSF had made of the set Glantz received.

a. *Brown & Williamson's argument: The First Amendment is irrelevant*

The conversion tort, on its face, does not regulate or restrict speech. Unlike the libel and slander torts that directly target speech, conversion applies to conduct, such as wrongful possession and use of another's personal property (a jacket or car, for example) that is often unrelated to the expression of any message.

68. See CAL. CIV. PROC. CODE §§ 512.010-120 (West 1979 & Supp. 1996) (describing California rules governing writs of possession).

69. See *id.* § 512.060 (providing that a judge may issue a writ of possession after a hearing if "[t]he plaintiff has established the probable validity of his claim to possession of the property" and has "provided an undertaking").

70. *Hartford Fin. Corp. v. Burns*, 158 Cal. Rptr. 169, 172 (Ct. App. 1979).

71. *FMC Corp. v. Capital Cities/ABC*, 915 F.2d 300, 304 (7th Cir. 1990) (emphasis in original) (citations omitted).

72. 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 610 (9th ed. 1988).

73. *Id.* § 611.

Brown & Williamson thus argued that the case did not warrant First Amendment scrutiny which might protect UCSF's publication and dissemination of the documents.⁷⁴ The court could, according to the company, decide the dispute simply by considering the three conversion elements; no balancing or weighing of free speech concerns was necessary. As the tobacco proprietor put it:

This case simply does not involve any state law that regulates speech within the meaning of the First Amendment, let alone a law that imposes prior restraints on speech based on content. B & W's state law claim does not depend upon proof that the University has engaged in tortious speech or even tortious dissemination of its documents. The gravamen of B & W's claim under California law is simply that the University has possession of its documents and has declined to return them.⁷⁵

i. *Cohen v. Cowles Media Co.*⁷⁶

Brown & Williamson relied on the United States Supreme Court's 1991 holding in *Cohen v. Cowles Media Co.* to support its argument that First Amendment scrutiny does not apply to generally applicable state laws that do not target speech.⁷⁷ In *Cohen*, the Supreme Court held by a narrow five-to-four margin that First Amendment scrutiny does not apply to, or bar, a state law promissory estoppel claim for breach of a reporter's promise of source confidentiality.⁷⁸ Justice White, writing for the *Cohen* majority, concluded that the case was governed by a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."⁷⁹

The theory of relief before the Supreme Court in *Cohen* was promissory estoppel, which "allows courts to enforce a promise, even though there is no legally binding contract, in order to avoid injustice."⁸⁰ Justice

74. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 15-23, *Regents of Univ. of Cal.* (No. 967298).

75. *Id.* at 15.

76. 501 U.S. 663 (1991).

77. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession 20-21, *Regents of Univ. of Cal.* (No. 967298).

78. *Cohen*, 501 U.S. at 665. Promissory estoppel "is an old Anglo-American legal rule that was promulgated to prevent injustice when someone fails to keep a promise that he or she has made, a promise that by itself does not add up to an enforceable contract, but a promise someone else has relied on." DON R. PEMBER, *MASS MEDIA LAW* 323 (1996).

79. *Cohen*, 501 U.S. at 665.

80. Barbara W. Wall & John P. Borger, *Broken Promises in the Aftermath of Co-*

White wrote that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."⁸¹ The majority held that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law."⁸² The defining precedent from *Cohen*, libel experts Robert D. Sack and Sandra S. Baron wrote, is that "[t]he First Amendment does not override ordinary tort or breach-of-contract principles imposed on a news-gatherer."⁸³

Brown & Williamson argued that *Cohen* controlled against UCSF and "foreclose[d] the University's claim of First Amendment protection."⁸⁴ The company claimed that, like the law of promissory estoppel, "[t]here can be no dispute that the legal remedy sought, a writ of possession issued in furtherance of the law of conversion and privilege, does not in any way target or sanction expressive conduct."⁸⁵ Any effect on speech, Brown & Williamson asserted, was collateral. It stated:

The California law at issue in no way penalizes or sanctions the University based upon the content of the messages it seeks to disseminate. The state law affords a remedy without regard to the University's views about smoking and health. . . . The United States Supreme Court has repeatedly held . . . that such collateral effects on speech do not give rise to First Amendment rights and do not require constitutional scrutiny.⁸⁶

Brown & Williamson's *Cohen* argument is not without merit. In fact, it has intimidated media attorneys in other disputes with the tobacco industry. Most notably, the recent fight between CBS and Brown & Williamson mentioned in the introduction⁸⁷ involved a threatened cause of action for tortious interference with contractual relations against the Tiffany network.⁸⁸ That theory, like promissory estoppel, does not target

hen, 13 COMM. LAW., Spring 1995, at 1, 17.

81. *Cohen*, 501 U.S. at 670.

82. *Id.* at 672.

83. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 701 (2d ed. 1994).

84. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 20, *Regents of Univ. of Cal.* (No. 967298).

85. *Id.* at 19.

86. *Id.* at 20.

87. See *supra* notes 26-27 and accompanying text.

88. See RESTATEMENT (SECOND) OF TORTS § 766 (1979) (stating the criteria for a cause of action for intentional interference with the performance of a contract by a third party). The basic elements for a cause of action for intentional interference with contractual relations are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Savage v. Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 314 (Ct. App. 1993). The interfer-

speech. Rather, the gist of tortious interference is "found in the common law tort principle that one who intentionally induces another to break a valid contract is, unless such conduct is privileged, liable for damages legally caused thereby."⁸⁹

The CBS/Brown & Williamson dispute centered on whether the network's actions in getting a former employee of the cigarette company to "tell all" about the tobacco industry on an episode of *60 Minutes* interfered with Brown & Williamson's nondisclosure contract with the ex-employee.⁹⁰ The contract forbade Jeffrey Wigand from discussing his employment at Brown & Williamson.⁹¹

CBS's conduct created the appearance that it induced Wigand to breach the nondisclosure agreement. Specifically, the network agreed to indemnify him against any defamation action that might result from his statements on the show.⁹² It also had paid the whistle-blowing former employee \$12,000 as a consultant for previous work on *60 Minutes* episodes.⁹³ Additionally, the network gave Wigand veto power over the story before it was to air.⁹⁴ The agreement between CBS and Wigand created the impression of a quid pro quo agreement under which he would talk, but only in return for cash, indemnification, and editorial control over the episode.

ence may be by "either unlawful means or by means otherwise lawful when there is a lack of sufficient justification," but a defendant may raise the affirmative defense of justification. *Herron v. State Farm Mut. Ins. Co.*, 363 P.2d 310, 312 (Cal. 1961). See generally Sandra S. Baron et al., *Tortious Interference: A Practical Primer For Media Practitioners*, in 2 LITIGATING LIBEL AND PRIVACY SUITS 483 (1996) (providing an overview of the tort of intentional interference with contractual relations and its applicability to journalistic newsgathering practices).

89. FOWLER V. HARPER ET AL., THE LAW OF TORTS § 6.5, at 303 (2d ed. 1986).

90. Carter, *supra* note 27, at A10.

91. *Id.*

92. Freedman et al., *supra* note 3, at A1.

93. *Id.*

94. *Id.*

CBS executives, after meeting with their attorneys, decided *not* to run the sizzling exposé on the tobacco industry.⁹⁵ They apparently feared liability for intentional interference with the confidentiality agreement.⁹⁶

Analyzing CBS's decision to spike the story, media defense attorney David Kohler observed that *Cohen* put the network on shaky legal ground.⁹⁷ He noted that under *Cohen*, "the First Amendment does not shield the media from general laws not particularly aimed at speech."⁹⁸ A First Amendment defense, therefore, may have proved unsuccessful.⁹⁹

Likewise, media attorney Cameron DeVore observed that *Cohen* was powerful precedent in CBS's decision to cave to Brown & Williamson.¹⁰⁰ CBS retained DeVore as outside counsel to evaluate potential legal liability for the Wigand interview.¹⁰¹ In response to sharp criticism of the network's decision to kill the episode,¹⁰² DeVore fired back in a letter to *The New York Times*:

The legal issue here involves whether a tort, here interference with a contractual relationship, is trumped by the First Amendment. The only time that happened in any significant way since 1964, when the Supreme Court constitutionalized the law of defamation in *New York Times v. Sullivan*, was in 1988 in *Falwell v. Hustler*, dealing with the closely related law of intentional infliction of emotional distress.

95. Elizabeth Jensen, *CBS's Lund Says '60 Minutes' Decision Wasn't Linked to Westinghouse Deal*, WALL ST. J., Nov. 14, 1995, at B16. CBS eventually broadcast a similar version of the original, unaired *60 Minutes* episode featuring the Jeffrey Wigand interview in February 1996, but only after *The Wall Street Journal* had already reported the substantially same information. See Frank Rich, *Smoking Guns at '60 Minutes'*, N.Y. TIMES, Feb. 3, 1996, at A23. CBS's decision to run the broadcast some three months after it originally killed the piece was "only half-heroic." *Id.* "It was precipitated not by newfound courage from CBS's lawyers, but by *The Wall Street Journal*," which had already "obtained and published its own account of Mr. Wigand's allegations, thereby reducing CBS's risk of a lawsuit from Brown & Williamson, Mr. Wigand's former employer." *Id.*

96. Grossman, *supra* note 26, at 44-45.

97. Kohler, *supra* note 20, at A16; see also William Bennett Turner, *News Media Liability for "Tortious Interference" with a Source's Nondisclosure Contract*, COMM. LAW., Spring 1996, at 13, 14 (providing an excellent overview of media liability for interference with nondisclosure contracts in light of dispute between Brown & Williamson and CBS, and observing that the "case overlooked by the lawyers so quick to criticize CBS's killing of the Wigand interview is *Cohen v. Cowles Media, Inc.* [sic]").

98. Kohler, *supra* note 20, at A16.

99. *Id.*

100. P. Cameron DeVore, *In CBS Tobacco Case, Contract Came Before First Amendment*, N.Y. TIMES, Nov. 17, 1995, at B2.

101. Grossman, *supra* note 26, at 44.

102. *E.g.*, *Self-Censorship at CBS*, N.Y. TIMES, Nov. 12, 1995, at E14 (opining that "media companies in play lose their journalistic aggressiveness when they let lawyers and corporate executives make decisions that ought to be the province of news executives").

I'm sure that the "many legal scholars" you contacted must have told you that while the Supreme Court has continued its strong protection for reputational torts, it has not recently provided any First Amendment protection for news gathering.

The most recent example was *Cohen v. Cowles Media Co.* (1991)¹⁰³

Although some media attorneys disagree with the analyses of Kohler and DeVore,¹⁰⁴ it is clear that the overarching principle from *Cohen*—generally applicable state tort laws that do not target speech are not subject to First Amendment scrutiny—provided solid ground for Brown & Williamson's argument against UCSF. Without application of First Amendment scrutiny or balancing of free speech interests, the road to recovery would be much smoother for Brown & Williamson. They would then only need to focus on the basic elements of conversion and the statutory rules for writs of possession.

This is not to say, however, that satisfying the elements of conversion would be easy for Brown & Williamson. It faced several high hurdles. In particular, UCSF did not possess originals of the documents; it only had copies.¹⁰⁵ Also, UCSF did not unlawfully obtain those copies; rather, it was merely a fortunate recipient.¹⁰⁶ Brown & Williamson needed to show an ownership or possessory interest in the copies to recover under a conversion theory.¹⁰⁷

Brown & Williamson argued that the attorney-client privilege¹⁰⁸ and work product doctrine¹⁰⁹ created a property right in the information contained in these copies.¹¹⁰ It claimed that under California law, these

103. DeVore, *supra* note 100, at B2.

104. See James C. Goodale, *CBS Must Clear the Air*, N.Y. TIMES, Dec. 6, 1995, at A23 (arguing that "no news organization has ever been sued for what it published solely on a claim of inducing breach of contract"); Rex S. Heinke & Lincoln D. Barlow, *Did CBS Choke?: Network May Have Had Little Reason to Fear a Tobacco Company Lawsuit*, S.F. DAILY J., Jan. 11, 1996, at 4 (stating that "it is unlikely the media can be successfully sued for inducing breach of a confidentiality agreement").

105. See *supra* note 1 and accompanying text.

106. See *supra* note 1 and accompanying text.

107. A plaintiff "who has neither title nor possession, nor any right to possession, cannot sue for conversion." WITKIN, *supra* note 78, *Torts* § 617, at 715.

108. See CAL. EVID. CODE §§ 950-962 (West 1995) (setting forth the relevant statutory provisions governing attorney-client privilege).

109. See *id.* § 2018 (West Supp. 1996) (providing California statutory authority governing attorneys' work product protection).

110. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 11, *Regents of Univ. of Cal.* (No. 967298). Brown & Williamson alleged that the court "should treat attorney client and attorney work product infor-

litigation and evidentiary privileges created a property interest in *all* of the copies of the documents.¹¹¹ A complete analysis of whether these privileges create property interests in copies of documents is beyond the scope of this Article. Instead, this Article focuses on a more fundamental question: Does the First Amendment play a role in the judicial analysis of a conversion cause of action?

b. The University's argument: Information suppression, not conversion

Like a law professor craftily toying with students' minds in a Socratic lecture, UCSF craftily began its attack against Brown & Williamson's Cohen-based argument by recasting the legal issue. The issue was *not*, according to UCSF, the return of stolen property under generally applicable conversion and writ of possession laws. Instead, the question was whether Brown & Williamson had a legal right to restrict the free flow of information on a topic of public importance.¹¹² The issue, simply put, was not one of *property* but one of *information*.¹¹³

Diverting focus from the conversion issue, the University argued that Brown & Williamson "want[ed] not only to obtain the set of documents in the [UCSF] Library, but [also] to prevent forever the University from possessing or distributing to the public and scholars any copy of those documents, wherever obtained."¹¹⁴ "B & W can cite no case in which such relief has been granted."¹¹⁵ By shifting the issue to the free flow of information, UCSF could hoist the First Amendment free speech banner in its defense. The case could not be decided without consideration of First Amendment concerns for academic freedom and free, unfettered debate on issues of public concern.

As Christopher Patti, in-house counsel for UCSF,¹¹⁶ told Judge Stuart Pollak during the pivotal hearing in the case, "[T]hese documents are

mation as a form of valuable intangible property subject to conversion, for which the appropriate remedy is the return of the documents and all copies to their rightful owner." *Id.* The tobacco company relied primarily on *Conn v. Superior Court*, 242 Cal. Rptr. 157 (Ct. App. 1987), for support of this argument. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 11, *Regents of Univ. of Cal.* (No. 967298).

111. Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 11, *Regents of Univ. of Cal.* (No. 967298).

112. Memorandum of Points and Authorities in Opposition to Application for Writ of Possession and Preliminary Injunction at 8, *Regents of Univ. of Cal.* (No. 967298).

113. *Id.* at 9.

114. *Id.* at 8-9.

115. *Id.* at 9.

116. For a brief profile of the then-37-year-old Christopher Patti, see *Science Major*, CAL. LAW., Mar. 1996, at 34.

extremely important to inform the public debate on this issue, and they have academic importance and they are things that the public and the government, and many people are very, very interested in. . . . This is a newsworthy, extremely publicly important issue."¹¹⁷

Patti's argument about public debate on newsworthy issues evoked the basis for the United States Supreme Court's seminal holding in *New York Times Co. v. Sullivan*.¹¹⁸ In *Sullivan*, the Court held for the first time that First Amendment protections of free speech and press limit or restrict the reach of state defamation laws designed to compensate targets of defamatory speech for reputational harm.¹¹⁹ In reaching that conclusion, the *Sullivan* Court stressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹²⁰

117. Court Transcript of May 25, 1995 Hearing at 40, *Regents of Univ. of Cal.* (No. 967298).

118. 376 U.S. 254 (1964).

119. The *Sullivan* Court stated that "libel can claim no talismanic immunity from constitutional limitations." *Id.* at 269. "It must be measured by standards that satisfy the First Amendment." *Id.* The Court adopted the actual malice standard to protect defendants from strict liability for false defamatory speech. *Id.* at 279-80. Under the actual malice standard, a public official plaintiff must prove by convincing clarity that the defendant either knew the speech at issue was false at the time it was communicated or acted with reckless disregard for whether it was false. *Id.* The actual malice standard has since been extended to apply to cases involving public figure plaintiffs. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967).

120. *Sullivan*, 376 U.S. at 270. The Supreme Court has held in other cases that robust debate on public issues must be safeguarded. See generally *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring) (stating that "[o]pen debate and discussion of public issues are vital to our national health").

Like the debate about segregation at the heart of *Sullivan*,¹²¹ the controversy over the dangers of smoking and the practices of the tobacco industry are issues of profound public importance. Efforts by Brown & Williamson to prevent the University from distributing information about the tobacco industry's practices inhibit the kind of robust, wide-open debate envisioned in *Sullivan*.

The University also likened Brown & Williamson's efforts to suppress dissemination and distribution of the documents to the federal government's attempt to suppress publication of the so-called Pentagon Papers in *New York Times Co. v. United States*.¹²² In that case, the government sought an order restraining both *The New York Times* and *The Washington Post* from publishing portions of a classified, forty-seven volume government report on the history of United States involvement in Vietnam.¹²³ The government claimed the report contained information that might, if publicly exposed, jeopardize national security interests.¹²⁴ The United States Supreme Court rejected the government's contention and its attempt to restrain the newspapers' right to publish the information.¹²⁵ The government could not clear the heavy burden it faced in seeking a presumptively unconstitutional remedy—a prior restraint on speech.¹²⁶

The University argued that if the national security interests in *New York Times Co. v. United States* were not sufficient to prevent distribution of the documents in that case, then any interests asserted by Brown & Williamson did not warrant suppression of the documents in the UCSF library.¹²⁷ The University contended that "the interests asserted by

121. The full-page advertisement that generated the libel action in *Sullivan* supported the actions of Dr. Martin Luther King, Jr., a leader of the civil rights movement, and black students in the South engaged in nonviolent demonstrations against segregation and racism. *Sullivan*, 376 U.S. at 256-58. Libel suits brought by Southern officials, such as the one brought by L.B. Sullivan, a city commissioner in Montgomery, Alabama, against *The New York Times*, were designed to do more than provide plaintiffs with compensation for reputational harm. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35-36 (1991). Their purpose was to chill criticism of segregation and coverage of the growing civil rights movement in the national press. *Id.* Southern officials hoped that rather than risk exposure to huge plaintiff verdicts in libel suits stemming from articles critical of Southern officials, the national press would choose instead to simply not cover the civil rights movement or expose Southern atrocities. *Id.* Libel law became a state political weapon used "to scare the national press—newspapers, magazines, the television networks—off the civil rights story." *Id.* at 35.

122. 403 U.S. 713 (1971).

123. *Id.* at 714.

124. *Id.* at 718-19 (Black, J., concurring).

125. *Id.* at 714.

126. *Id.*

127. Memorandum of Points and Authorities in Opposition to Application for Writ of

B & W are nowhere close in gravity to those found insufficient in the Pentagon Papers Case."¹²⁸

The University did not stop its First Amendment line of defense with arguments about unfettered debate on issues of public importance and the dangers of prior restraints. Instead, it enveloped those arguments in the academic context of the case.¹²⁹ Citing United States Supreme Court decisions in *Sweezy v. New Hampshire*¹³⁰ and *Keyishian v. Board of Regents of New York*,¹³¹ the University argued that scholarly inquiry and researcher access to the documents increased the First Amendment concerns for protecting dissemination of the documents.¹³²

The University also cited a line of cases holding that when a reporter lawfully obtains truthful information about an issue of public concern, the First Amendment prohibits punishment for the distribution of that speech absent an interest of the highest order.¹³³ The University argued that it lawfully obtained the documents, that those documents were truthful, and that they involved a matter of public concern.¹³⁴

For all of the above reasons, the University asserted that, contrary to Brown & Williamson's position, First Amendment concerns barred the cigarette manufacturer's recovery of the documents.

c. Superior court decision: Of witch hunts and escaped genies

Judge Pollak rejected Brown & Williamson's argument.¹³⁵ The case could not be decided without considering the First Amendment. He observed early in the crucial May 25, 1995, hearing on the request for a writ

Possession and Preliminary Injunction at 18, *Regents of Univ. of Cal.* (No. 967298).

128. *Id.*

129. *Id.* at 16.

130. 354 U.S. 234 (1957). Harvard constitutional law scholar Laurence Tribe observed that "[a]lthough the Supreme Court has not explicitly identified academic freedom as an independent first amendment doctrine, it has at least implicitly recognized its importance." LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-4, at 813 n.32 (2d ed. 1988).

131. 385 U.S. 589 (1967). In *Keyishian*, the United States Supreme Court stated that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Id.* at 603.

132. Memorandum of Points and Authorities in Opposition to Application for Writ of Possession and Preliminary Injunction at 16, *Regents of Univ. of Cal.* (No. 967298).

133. Court Transcript of May 25, 1995 Hearing at 42-43, *Regents of Univ. of Cal.* (No. 967298) (citations omitted).

134. *Id.* at 40-41.

135. *Id.* at 50-52.

of possession that "there are First Amendment considerations that have to be taken into account."¹³⁶ He elaborated on those considerations throughout the hearing.

Pollak initially observed that an academic institution like UCSF has First Amendment interests that are "as great, if not greater" than those of traditional media defendants like newspapers and television stations.¹³⁷ Those First Amendment interests are tied to facilitating interchange of ideas and information in a public dialogue.¹³⁸ In a crucial exchange with Barbara Caulfield, the Latham & Watkins attorney and former federal judge who argued the case on behalf of Brown & Williamson,¹³⁹ Judge Pollak observed:

I think, in terms of the interests underlying the First Amendment, the interchange of ideas, and so forth, this is an academic center . . . [with] an interest in academic freedom, if not freedom of the press.

After all, what the result of what you are asking would be, to the extent it was successful, to the extent it is doable at all, in view of where things stand at the moment, would be to suppress information and to prevent information from being used in a public dialogue in various ways. And it seems to me those are exactly the First Amendment interests that we are concerned with. And, sure, the University isn't a newspaper, but its the same underlying concern, I think, that we have to be dealing with.¹⁴⁰

Judge Pollak's statement is crucial for three reasons. First, it acknowledges a distinct, unenumerated First Amendment right of academic freedom. The text of the First Amendment is silent on the subject of academic freedom.¹⁴¹ In a deep bow to the judicial activism of judges and justices past, Judge Pollak nonetheless recognized an implied or peripheral right of academic freedom lurking within the penumbra of the First Amendment's Free Speech and Free Press Clauses.¹⁴²

The recognition of implied rights in those clauses is not new. Indeed, the United States Supreme Court recognized an implied right of academ-

136. *Id.*

137. *Id.* at 15.

138. *Id.* at 15-16.

139. Kisliuk, *supra* note 1, at 2. Caulfield, a former federal judge in the Northern District of California, is a partner in the San Francisco office of Latham & Watkins. *Id.* On appeal Brown & Williamson was represented by Kevin J. Dunne of the San Francisco law firm Sedgwick, Detert, Moran & Arnold. Stipulation Re Substitution of Attorneys filed on Sept. 7, 1995 at 1, *Regents of Univ. of Cal.* (No. 967298).

140. Court Transcript of May 25, 1995 Hearing at 15-16, *Regents of Univ. of Cal.* (No. 967298).

141. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

142. See Court Transcript of May 25, 1995 Hearing at 15-16, *Regents of Univ. Cal.* (No. 967298).

ic freedom in dictum in *Griswold v. Connecticut*.¹⁴³ Justice William O. Douglas, writing for the Court in *Griswold*, observed:

The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.¹⁴⁴

Second, Judge Pollak suggested that the scope of the unenumerated First Amendment right of academic freedom is extremely broad. It reaches beyond protecting professors' classroom decisions about what to teach and how to teach—what Justice Douglas called the "freedom to teach."¹⁴⁵ The right also encompasses more than the ability to generate and produce new information and knowledge—what the *Griswold* Court dubbed as "freedom of inquiry."¹⁴⁶

More inclusive than either the right to teach or the freedom of inquiry, the First Amendment right of academic freedom articulated by Judge Pollak includes the ability to *distribute and disseminate* the fruits of academic inquiry.¹⁴⁷ As quoted above, Judge Pollak observed that Brown & Williamson's request was one "to suppress information."¹⁴⁸ In brief, the scope of academic freedom must include not only *information generation* (freedom of inquiry) but also *information dissemination*.¹⁴⁹

This difference is more than semantic. It is crucial. Limiting the implied First Amendment right of academic freedom to information generation would not help UCSF; the University did not generate or produce the cigarette documents.¹⁵⁰ It was, instead, a lucky recipient of a treasure chest of knowledge long submerged under a sea of alleged privileges and work product arguments.¹⁵¹ Its job, as a *public* university, was to make *public* that knowledge.

Finally, the importance of Judge Pollak's reasoning goes beyond recognition of a broad First Amendment right of academic freedom which includes the freedom to disseminate information. He acknowledged the

143. 381 U.S. 479 (1965).

144. *Id.* at 482-83 (emphasis added) (citations omitted).

145. *Id.* at 482.

146. *Id.*

147. Court Transcript of May 25, 1995 Hearing at 15-16, *Regents of Univ. of Cal.* (No. 967298).

148. *Id.*

149. *Id.*

150. *Id.* at 7, 16.

151. *Id.* at 13-15.

crucial importance of not just the *process* of dissemination, but the *product* of that dissemination. This product or "telos" is "public dialogue"¹⁵² that may "affect legislation, either state or federal."¹⁵³

With that language Judge Pollak squarely embraced the vision and free speech theory of philosopher-educator Alexander Meiklejohn.¹⁵⁴ Meiklejohn believed that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government."¹⁵⁵ In a self-governing democracy, one in which the "[r]ulers and ruled are the same individuals,"¹⁵⁶ wise decisions about public policy issues require that "all facts and interests relevant . . . shall be fully and fairly presented."¹⁵⁷

Commentators frequently identify the Supreme Court's reasoning in *Sullivan* with Meiklejohn's version of democratic self-governance.¹⁵⁸ In fact, since First Amendment scholar Harry Kalven, Jr.'s 1964 article on *Sullivan* linked the Court's reasoning to Meiklejohn,¹⁵⁹ legal scholars have cited what free expression theorist Lee C. Bollinger calls an axiomatic "Meiklejohn-*Sullivan* alliance."¹⁶⁰ Former Supreme Court Justice William Brennan, author of the Court's seminal *Sullivan* opinion, reinforced the link when he paid homage to Meiklejohn in a Brown University lecture.¹⁶¹ Today, as University of Chicago constitutional law scholar Cass R. Sunstein suggests, it is a "relatively uncontroversial working hypothesis that the [*Sullivan*] decision rested on Professor Meiklejohn's conception of the first amendment."¹⁶²

Judge Pollak's decision embraces the reasoning of the Meiklejohn-*Sullivan* alliance. Without information contained in the Brown & Williamson documents, public debate on regulating cigarette advertising and classifying nicotine as a drug would weaken. Dissemination of the Brown & Williamson information promotes and facilitates wise and informed

152. *Id.* at 16.

153. *Id.* at 18.

154. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

155. *Id.* at 27.

156. *Id.* at 12.

157. *Id.* at 26.

158. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 49-50 (1986).

159. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964).

160. BOLLINGER, *supra* note 158, at 49.

161. William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

162. Cass R. Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 898 (1984).

decision making on cigarette and nicotine regulation, a topic that directly impacts public health, safety, and welfare.

We may never know the exact impact the information contained in the Brown & Williamson documents had on President Bill Clinton's recent unveiling of new, stringent regulations targeting tobacco advertising.¹⁶³ It is not mere idle speculation, however, to think that the documents informed public dialogue, which in turn resulted in new federal legislation announced on August 23, 1996.¹⁶⁴ Indeed, David A. Kessler, FDA Commissioner and the person charged with carrying out the new regulations, said publication of the Brown & Williamson documents "was a major moment, beyond which all went in one direction. . . . It was the first time we had anyone saying, 'We are in the business of selling nicotine, which is an addictive drug.' . . . Before that, all was indirect evidence."¹⁶⁵

Judge Pollak recognized the potential influence of the information on public dialogue and government policy. He observed that "the nature of what is being requested would in fact impinge upon public discussion, public study of this information, which has a bearing on all kinds of issues of public health, public law, documents which may be taken to suggest the advisability of legislation in all kinds of areas."¹⁶⁶

With First Amendment interests squarely in mind, and a request for equitable relief on the table, Judge Pollak reasoned that "inevitably what is presented is a weighing process."¹⁶⁷ In that process he characterized First Amendment concerns as "a very strong public interest in permitting . . . this information to remain available for use by the University or by others who may obtain it from the University."¹⁶⁸

In direct contrast to UCSF's First Amendment interests, Judge Pollak belittled Brown & Williamson's goals. He observed that the cigarette

163. See Barr & Hamilton, *supra* note 6, at A1.

164. *Id.*

165. HILTS, *supra* note 40, at 141. Kessler's comments reflect the sum and substance of one particularly damning document in the Brown & Williamson cache. In 1963—long before the current crackdown on cigarettes began—Brown & Williamson's general counsel, Addison Yeaman, wrote that "nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." GLANTZ ET AL., *supra* note 2, at 58. The gist of this 33-year-old statement, Stanton Glantz observed, "contrasts sharply with the tobacco industry's recent public claims that nicotine only adds taste and flavor." *Id.* at 73.

166. Court Transcript of May 25, 1995 Hearing at 58, *Regents of Univ. of Cal.* (No. 967298).

167. *Id.* at 57.

168. *Id.* at 58.

producer's interests should be questioned, stating, "First of all, at most their interest at this point, I think, is in avoiding potential liability of one sort or another. I don't mean to say that is insignificant. But, in and of itself, when compared with the other competing interest, it may not be as great."¹⁶⁹

Judge Pollak was quick to observe that Brown & Williamson could assert the attorney-client privilege and work product doctrine in other litigation.¹⁷⁰ Brown & Williamson could fight its battle over the applicability of those privileges in other venues. The issue of admissibility of the documents in products liability cases, however, was not before his court.¹⁷¹ The University was not seeking to admit the documents into evidence in a case against Brown & Williamson. The UCSF dispute was neither a products liability case nor one brought by an attorney general to recover health care costs for injuries caused by tobacco products. It was, instead, simply a case about publishing information.

Judge Pollak observed that his decision against Brown & Williamson should not be construed as a waiver of evidentiary and litigation privileges in other cases. He stated that if the cigarette manufacturer's covert agenda against the University was not recovery of documents but preserving the privileges for use in other fora, then "I suppose . . . [that agenda] has been achieved. . . . I suppose that anybody's job in trying to show that they voluntarily acquiesced in the disclosure, they're going to have a hard time with that."¹⁷² In other words, by fighting the good fight against UCSF, Brown & Williamson had not waived whatever privileges might protect the documents in other cases.

Before denying Brown & Williamson's application for a writ of possession, Judge Pollak made a further observation about the danger of ruling in favor of the cigarette company. Such a ruling, he observed, might lead to "witch hunts" by Brown & Williamson to find *anyone* with copies of the documents.¹⁷³ If Brown & Williamson prevailed against UCSF,

169. *Id.*

170. *Id.* at 61.

171. *Id.* at 51. Judge Pollak stated:

We are not dealing with the question of the admissibility of any of these documents in to [sic] evidence during the course of a particular proceeding. Any question that particular documents should not be received in evidence because they are privileged, because the privilege has not been waived, are for determination in another context, in another time.

Id.

172. *Id.* at 62; see also CAL. EVID. CODE § 912 (West 1995) (providing California statutory authority for waiver by voluntary disclosure of the attorney-client privilege).

173. Court Transcript of May 25, 1995 Hearing at 60, *Regents of Univ. of Cal.* (No. 967298).

the next step would be to attempt to pursue and trace all of the copies of the documents that have gone from the University elsewhere, and have already been presented with applications to depose faculty members, depose other people, to find out which documents they have, when they get them, who they give them to. And, really, the specter of putting that process in motion, I think, is a quite disturbing one. The word that comes to mind is "witch hunts." I don't know that is fair.¹⁷⁴

Judge Pollak did not want to create a slippery slope of eroding First Amendment protection. He held the line on the cigarette manufacturer's efforts to track down every person who ever saw the documents. To grant Brown & Williamson's writ of possession

would be setting in process some steps that I think would be very, very troublesome, and certainly would present a good many additional First Amendment concerns, intruding into the research of others, and what others have done, looked at the information, who they gave them to, and tracing the whole thing through. A very disturbing prospect.¹⁷⁵

It was, as the judge put it, "simply too late, at this point [for Brown & Williamson]. The genie is out of the bottle."¹⁷⁶

In addition to weighing interests, Judge Pollak grounded his decision in precedent. He found applicable the Seventh Circuit Court of Appeals' decision in *FMC Corp. v. Capital Cities/ABC, Inc.*¹⁷⁷ In that case, the Seventh Circuit Court of Appeals, sitting in Illinois, applied California conversion law.¹⁷⁸ The appellate court applied federal and Illinois law regarding defendant ABC's First Amendment-related defenses.¹⁷⁹

FMC involved an ABC *World News Tonight* broadcast about a vehicle manufactured in part by FMC for the United States Army.¹⁸⁰ During the show, an ABC reporter identified four copies of documents as belonging to FMC.¹⁸¹ FMC alleged the documents were missing from its files.¹⁸² Like the UCSF scenario, neither party disputed that the defendant was not responsible for the loss of FMC's documents.¹⁸³ Unlike the UCSF

174. *Id.* at 59-60.

175. *Id.* at 60.

176. *Id.*

177. 915 F.2d 300 (7th Cir. 1990). Judge Pollak called the case the "most on point." Court Transcript of May 25, 1995 Hearing at 54, *Regents of Univ. of Cal.* (No. 967298).

178. *FMC Corp.*, 915 F.2d at 302.

179. *Id.*

180. *Id.* at 301.

181. *Id.*

182. *Id.*

183. *Id.*

case, however, the plaintiff did not possess copies or originals of the allegedly converted documents.¹⁸⁴

FMC filed suit for conversion, seeking return of the documents and damages for misappropriation of documents it claimed contained confidential business information.¹⁸⁵ The trial court dismissed the conversion claim, holding "that copies of documents could not be converted."¹⁸⁶ The appellate court then considered the issue of "whether ABC must return copies of FMC's own documents to FMC if the only documents ABC possesses are *merely duplicates* of the documents removed from FMC's files."¹⁸⁷

The appellate court, although not engaging in extensive elaboration of the free press and free speech principles at stake, took account of First Amendment interests.¹⁸⁸ It observed that the case involved balancing "delicate First Amendment principles."¹⁸⁹ The court initially concluded that ABC must give copies of the documents to FMC.¹⁹⁰ In consideration of First Amendment interests, however, it also held that

ABC is free to retain copies of any of FMC's documents in its possession (and to disseminate any information contained in them) in the name of the First Amendment. Moreover, ABC is in no way being punished for the dissemination of FMC's information. It is merely being required to make copies of documents it refuses to return.¹⁹¹

In brief, ABC was able to keep the documents but was forced to make copies to give to FMC.¹⁹² This remedy, of course, would be useless for Brown & Williamson.

The cigarette manufacturer's goal against UCSF was not to get the documents back for its own use. It was not as if they contained a secret formula for making cigarettes without which the company would be unable to keep people puffing. Also, it is highly doubtful that Brown & Williamson feared that Stanton Glantz and the University would start to produce UCSF-brand cigarettes.

Rather, Brown & Williamson's objective was to suppress information. It wanted to keep the documents out of the University's hands, and, in turn, keep them away from attorneys for the plaintiffs involved in products liability litigation against the company.

184. *Id.*

185. *Id.*

186. *Id.* at 302.

187. *Id.* at 303.

188. *Id.*

189. *Id.* at 306.

190. *Id.* at 305.

191. *Id.*

192. *See id.*

Allowing UCSF to keep copies of the documents and to disseminate the information contained in them—as the Seventh Circuit Court of Appeals allowed ABC to do with FMC—would not benefit Brown & Williamson. The information would still be public. Its public nature would harm the company in products liability litigation and other lawsuits filed by state attorneys general to recover health care costs.

Applying the reasoning in *FMC*, Judge Pollak concluded that allowing UCSF to keep copies of the documents “simply is not a conversion.”¹⁹³ He added that had the University done something wrong to obtain the documents, his decision might have been different.¹⁹⁴ He ruled in the University’s favor.¹⁹⁵

In summary, Judge Pollak concluded that the generally applicable state laws of conversion and writ of possession could not escape First Amendment scrutiny.¹⁹⁶ Moreover, in articulating the First Amendment interests at stake, he gave expansive meaning to an unenumerated right of academic freedom.¹⁹⁷ Academic freedom means more than the right to teach and the right of inquiry.¹⁹⁸ It also includes the ability to *disseminate and distribute* to the public knowledge gathered and produced at public universities.¹⁹⁹

His reasoning reflects a strong concern for protecting the kind of uninhibited, robust, and wide-open public debate on important public issues that the United States Supreme Court prized in *New York Times Co. v. Sullivan* and that Alexander Meiklejohn found fundamental for a truly self-governing democracy.²⁰⁰ Regulation of cigarettes and the tobacco industry is at the heart of political debate today.²⁰¹ The dangers and prevalence of teenage smoking concern all.²⁰² Cigarettes and related tobacco products kill more than 400,000 American smokers and 53,000 non-

193. Court Transcript of May 25, 1995 Hearing at 55, *Regents of Univ. of Cal.* (No. 967298).

194. *Id.* at 55-56 (“But here there is no suggestion that the University has done anything wrong.”).

195. *Id.* at 56.

196. *Id.* at 15.

197. *Id.* at 15-16.

198. *Id.*

199. *Id.*

200. See *supra* notes 154-62 and accompanying text.

201. See *supra* note 6 (describing new FDA regulations on tobacco advertising).

202. See generally David A. Kessler, *Nicotine Addiction in Young People*, 333 *NEW ENG. J. MED.* 186 (1995) (providing FDA Commissioner’s views and data on children and tobacco).

smokers each year.²⁰³ Judge Pollak's decision enhanced public debate on such issues. Ultimately, he concluded that the First Amendment interests outweighed Brown & Williamson's interest in protecting itself from liability in other litigation.²⁰⁴

2. A New Breed of SLAPP Suit?

In a 1988 article in *Social Problems*, two University of Denver professors, Penelope Canan and George W. Pring, identified a growing body of cases they termed "strategic lawsuits against public participation."²⁰⁵ Like Dean William L. Prosser's seminal classification of four privacy torts in a 1960 law journal article,²⁰⁶ Canan and Pring designated a new category of lawsuit known by the acronym "SLAPP," and the name stuck.

In their initial article, Canan and Pring defined SLAPPs as "attempts to use civil tort action[s] to stifle political expression."²⁰⁷ In a later article, Pring observed that the "apparent goal of SLAPPs is to stop citizens from expressing their political rights or to punish them for having done so. SLAPPs send a clear message: there is a 'price' for speaking out politically."²⁰⁸

Typical causes of action filed by so-called SLAPPers include "defamation, abuse of process, interference with economic advantage, or other intentional harm."²⁰⁹ The SLAPPER's goal, however, is not to prevail on such theories. Instead, the purpose is "to overwhelm the defendant with the inconvenience and expense of litigation."²¹⁰ As one California appellate court recently noted, "SLAPP plaintiffs do not intend to win their suits; rather they are filed solely for delay and distraction . . . and to

203. C. Everett Koop, *Foreword to GLANTZ ET AL.*, *supra* note 2, at xvii.

204. Court Transcript of May 25, 1995 Hearing at 57-62, *Regents of Univ. of Cal.* (No. 967298).

205. Canan & Pring, *supra* note 17, at 506.

206. Prosser, *supra* note 19, at 389.

207. Canan & Pring, *supra* note 17, at 506.

208. George Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5-6 (1989).

209. Penelope Canan et al., *Political Claims, Legal Derailment, and the Context of Disputes*, 24 LAW & SOC'Y REV. 923, 924 (1990); *see also* Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994) (stating that "favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress"); Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113 (1988) (stating that "[t]hese intimidation suits take the form of actions for malicious prosecution, abuse of process, intentional interference with prospective economic advantage, libel, slander, conspiracy, or other intentional torts").

210. James E. Grossberg & Dee Lord, *California's Anti-SLAPP Statute*, 13 COMM. LAW., Fall 1995, 3, 4.

punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances."²¹¹ In brief, a SLAPP "is a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights."²¹² Its purpose is "not to vindicate a legally cognizable right of the plaintiff."²¹³

Individuals often find themselves SLAPP targets for "reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations."²¹⁴ Although individuals are commonly the victims of SLAPP suits, newspapers also may be SLAPPED by groups outraged over coverage of their cause or organization.²¹⁵

A growing number of states have adopted anti-SLAPP legislation to combat this new wave of litigation.²¹⁶ For instance, California Code of Civil Procedure Section 425.16(b) provides in relevant part:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.²¹⁷

211. *Dixon v. Superior Court*, 36 Cal. Rptr. 2d 687, 693 (Ct. App. 1994). The Petition Clause of the First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

212. *Wilcox*, 33 Cal. Rptr. 2d at 449 n.2.

213. *Id.* at 450.

214. *Pring*, *supra* note 208, at 5.

215. *See Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 55 (Ct. App. 1995), *cert. denied*, 117 S. Ct. 53 (1996) (holding that the *San Francisco Chronicle* could use California's anti-SLAPP statutes in an action filed against it by More University).

216. *Grossberg & Lord*, *supra* note 210, at 6 n.10 (noting that Delaware, Massachusetts, Minnesota, Nevada, New York, Rhode Island, and Washington have also enacted anti-SLAPP legislation).

217. CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1996). *See generally* *Grossberg & Lord*, *supra* note 210, at 3-7 (describing the California anti-SLAPP provision and the questions and issues it raises). Two excellent resources available free on the World Wide Web that provide additional information on the California anti-SLAPP statute are the San Francisco-based *The First Amendment Project* (last modified Jan. 1996) <<http://www.well.com/user/fap>> and the *California Anti-SLAPP Project* (last modified Feb. 5, 1996) <<http://www.sirius.com/casp/intro.html>>.

Speech protected under the statute includes “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest” and “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.”²¹⁸ A motion to strike should be granted “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”²¹⁹ The legislature adopted the statute in light of “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances.”²²⁰

The University of California contended that the complaint filed by Brown & Williamson was this type of lawsuit.²²¹ The University filed a motion to strike the cigarette manufacturer’s complaint pursuant to California Code of Civil Procedure section 425.16.²²²

Judge Pollak ultimately dismissed the motion to strike because the University was not a “person” within the meaning of the anti-SLAPP statute.²²³ The statute applies only to a “cause of action against a *person* arising from any act of that *person* in furtherance of the person’s right of petition or free speech.”²²⁴

Judge Pollak’s ruling, however, was made *prior* to the decision in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*²²⁵ In *Lafayette Morehouse*, a California appellate court held that the statute protected a corporate entity—a newspaper.²²⁶ If Judge Pollak had confronted that precedent, his decision might have been different. As it was, however, he never reached the substantive merits of the SLAPP suit issue.

Judge Pollak’s denial of the University’s motion to strike therefore is *not* an indication that the University’s argument was frivolous. He also observed during oral argument that the anti-SLAPP allegation was “[a]n interesting issue, and I’m sure both sides could argue it.”²²⁷ Furthermore, Judge Pollak considered the SLAPP issue only after he announced

218. CAL. CIV. PROC. CODE § 425.16(e).

219. *Id.* § 425.16(b).

220. *Id.* § 425.16(a).

221. Memorandum of Points and Authorities in Support of Defendant’s Special Motion to Strike Complaint at 1-2, *Regents of Univ. of Cal.* (No. 967298).

222. *See id.*; CAL. CIV. PROC. CODE § 425.16(b).

223. Court Transcript of May 25, 1995 Hearing at 63, *Regents of Univ. of Cal.* (No. 967298).

224. CAL. CIV. PROC. CODE § 425.16(b) (emphasis added).

225. 44 Cal. Rptr. 2d 46 (Ct. App. 1995), *cert. denied*, 117 S. Ct. 53 (1996).

226. *Id.* at 55.

227. Court Transcript of May 25, 1995 Hearing at 63, *Regents of Univ. of Cal.* (No. 967298).

that he would not issue the writ of possession for Brown & Williamson. Perhaps the judge was simply throwing a bone to the beleaguered tobacco company at that stage in the proceedings.

In this context, the substantive merits of the University's argument that Brown & Williamson's suit was nothing more than a SLAPP are worthy of consideration. Was the complaint for a writ of possession based on a conversion theory a SLAPP suit designed to suppress important information that would fuel informed public debate on regulating Big Tobacco? Or was it a legitimate attempt to recover documents and to prevent a waiver in other litigation cases of privileges that might protect them?

a. The University's argument

The University began its motion to strike by explicating what it perceived to be the lawsuit's true purpose:

to prevent scholars and the public from obtaining access to information contained in documents in a public library at the University of California. With good reason, B&W believes that the documents are damaging to it because they show that the company knew about the dangers of smoking for decades while it suppressed this public health information and even denied it.²²⁸

The University argued that "[a]lthough touted as an action for recovery of 'personal property,' what B & W is really seeking is to prevent the use and dissemination of information."²²⁹ Playing to the anti-SLAPP suit statute's requirement that to be stricken a complaint must target speech "in connection with a public issue,"²³⁰ the University alleged that "[t]here can be little question that the health consequences of smoking, and B & W's early knowledge of them, constitute a 'public issue.'"²³¹ In addition, the University argued that there cannot be "any question that whether or not the public is allowed access to such information, and whether or not it is accessible to scholars is a matter of First Amendment concern."²³² The University thus concluded that the Brown & Williamson complaint was "a classic instance" of a SLAPP suit.²³³

228. Memorandum of Points and Authorities in Support of Defendant's Special Motion to Strike Complaint at 1, *Regents of Univ. of Cal.* (No. 967298).

229. *Id.* at 3.

230. CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1996).

231. Memorandum of Points and Authorities in Support of Defendant's Special Motion to Strike Complaint at 3-4, *Regents of Univ. of Cal.* (No. 967298).

232. *Id.* at 4.

233. *Id.* at 1.

b. *Brown & Williamson's argument*

Brown & Williamson took a three-pronged approach to counter the University's allegation.²³⁴ First, it asserted that conversion was not a typical SLAPP cause of action.²³⁵ Citing a 1994 California appellate court decision, Brown & Williamson argued that common SLAPP theories are defamation, "interference with prospective economic advantage, nuisance and intentional infliction of emotional distress."²³⁶ Its case was nothing like what two California appellate courts recently called the typical, paradigmatic SLAPP suits—ones that involve citizens, an environmental group, or a neighborhood association opposed to a real estate development in which the developer sues to chill opposition to its plans.²³⁷

Second, Brown & Williamson argued that it filed suit to redress a legally cognizable claim.²³⁸ Its purpose was not to obtain an economic advantage over the University through expensive and protracted litigation.²³⁹ Brown & Williamson maintained they had "worked diligently to resolve this issue quickly so there is no economic advantage from the filing of the suit itself, and B & W has not requested any damage in the prayer for relief so no economic advantage is sought."²⁴⁰ Brown & Williamson asserted that "[f]reedom to speak about tobacco-related issues has not and will not be restrained or chilled by the filing or resolution of this lawsuit. The issue is return of property and prevention of wrongful acquisition of privileged information."²⁴¹

Finally, in close relation to its second argument, Brown & Williamson argued that its primary motivation was not to tie up the University's resources for a long period of time.²⁴² It stressed that it had "a material interest in having this court resolve the underlying conversion issue in an expedited fashion. Until B & W recovers possession of its confidential documents, it risks having the privileged information contained therein disclosed to other adverse parties. . . ."²⁴³

234. Opposition to Defendant's Special Motion to Strike Complaint at 2-4, *Regents of Univ. of Cal.* (No. 967298).

235. *Id.* at 2-3.

236. *Id.* at 2 (citing *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994)).

237. *Id.* at 3 n.2.

238. *Id.* at 3.

239. *Id.*

240. *Id.*

241. *Id.* at 5.

242. *Id.* at 3.

243. *Id.* at 3-4.

c. *A closer look at the SLAPP arguments*

Judge Pollak never reached the merits of the SLAPP issue. He dismissed the motion to strike on the now questionable, technical ground that the University was not a "person" within the meaning of California's anti-SLAPP provision.²⁴⁴ This subsection analyzes the substantive merits of the University's allegation that the case was a SLAPP suit.

i. A "typical" SLAPP suit?

An analytical starting point is recognition that SLAPP suits are *not* limited to environmental issues, despite Brown & Williamson's suggestion to the contrary. Quoting the California appellate court decision *Dixon v. Superior Court*,²⁴⁵ Brown & Williamson argued that "[t]he *typical* SLAPP suit involves citizens opposed to a particular real estate development."²⁴⁶ However, it disingenuously omitted the *Dixon* court's footnote: "Although SLAPP suits involving environmental issues are common, *they may involve other matters.*"²⁴⁷

Likewise, Brown & Williamson quoted the California appellate court decision in *Wilcox v. Superior Court*²⁴⁸ for the proposition that "[t]he paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans."²⁴⁹ What Brown & Williamson omitted from this citation was the *Wilcox* court's statement that "SLAPPs, however, are by no means limited to environmental issues . . . nor are the defendants necessarily local organizations with limited resources."²⁵⁰ SLAPPs can arise in settings other than environmental disputes.

For instance, a California court recently held that a libel action filed by a university to stifle a newspaper's criticism of the school was a SLAPP suit.²⁵¹ Furthermore, the California anti-SLAPP statutory provision does

244. Court Transcript of May 25, 1995 Hearing at 63, *Regents of Univ. of Cal.* (No. 967298).

245. 36 Cal. Rptr. 2d 687 (Ct. App. 1995).

246. Opposition to Defendant's Special Motion to Strike Complaint at 3 n.2, *Regents of Univ. of Cal.* (No. 967298) (quoting *Dixon*, 36 Cal. Rptr. 2d at 693).

247. *Dixon*, 36 Cal. Rptr. 2d at 693 n.7 (emphasis added) (citing *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446 (Ct. App. 1994)).

248. 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

249. *Id.* at 449.

250. *Id.*

251. *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46 (Ct. App.

not restrict SLAPPs to specific factual patterns. It states only that a SLAPP suit may arise from a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."²⁵² As a result, the fact that the UCSF dispute did not involve an environmental issue does not preclude it from attaining SLAPP status.²⁵³

Brown & Williamson's argument that conversion is not typical SLAPP suit fodder is also somewhat hollow. The cigarette manufacturer cited *Wilcox* for the proposition that "favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress."²⁵⁴ Conversion is not included on this laundry list. Its application in *Regents of University of California*, however, was clearly business related. The documents in question related to the research, development, and manufacturing processes of a powerful player in the cigarette industry. Disclosure of the information in those documents was harmful to Brown & Williamson's business in that it interfered with its business interests. In fact, the documents may have led to increased regulation of the tobacco industry.²⁵⁵ It is thus hard to fathom how a cause of action for conversion, in the context of the UCSF dispute, is not a business tort. The United States Supreme Court has held that a label given to a cause of action must be distinguished from its actual operation and effect, especially in cases involving First Amendment concerns.²⁵⁶

There is nothing about either the factual underpinning of *Regents of University of California* or the underlying cause of action in the case

1995), *cert. denied*, 117 S. Ct. 53 (1996).

252. CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1996).

253. To some extent, however, one could argue that the dangers of secondhand smoke in restaurant, working, and social environments poses a serious environmental issue.

254. *Wilcox*, 33 Cal. Rptr. 2d at 449. Of the 228 SLAPPs studied by the University of Denver's Political Litigation Project as of 1989, 53% involved causes of action for defamation, 32% for business torts, 20% for so-called judicial torts such as abuse of process and malicious prosecution, 18% for conspiracy, 13% for constitutional civil rights violations, and 32% for nuisance and other causes of action. Pring, *supra* note 208, at 9. The figures total more than 100% because the cases typically involve multiple claims. *Id.* at 9 n.16.

255. See *supra* notes 163-64 and accompanying text.

256. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (stating "we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law"); *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (providing that "in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect").

that disqualifies it from SLAPP suit status.²⁵⁷ Standing alone, however, this neither affirms nor denies the University's allegation that it was SLAPPED.

ii. Speech about a matter of public interest?

SLAPP suits, under California law, target speech about a public issue.²⁵⁸ This includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."²⁵⁹

It strains belief to argue that the B & W documents are not about an issue of public concern, given the annual death toll of more than 400,000 Americans from smoking.²⁶⁰ The documents relate to regulation of nicotine, cigarettes, and other tobacco products and thus pertain to consumer protection and public health, safety, and welfare.²⁶¹

If, as Stanton Glantz and company argue in *The Cigarette Papers*, the documents reveal that Brown & Williamson and its parent company, BAT Industries, "knew that tobacco was addictive and causes disease,"²⁶² it

257. See *supra* notes 245-56 and accompanying text.

258. See CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1996) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a motion to strike . . .").

259. *Id.* § 425.16(e). The code also provides that an act is in furtherance of a person's right of petition or free speech when a statement is made "in connection with an issue under consideration or review by legislative, executive, or judicial body." *Id.*

260. *The Smoke Begins to Clear: The News from the Battlefield Isn't Good for Tobacco*, S.F. EXAMINER, Aug. 23, 1996, at A22. According to a recent study supported by the National Cancer Institute, "[s]moking is a preventable cause of death, yet it accounts for more than 434,000 deaths annually in the United States." Melody Powers Noland et al., *Relationship of Personal Tobacco-Raising, Parental Smoking, and Other Factors to Tobacco Use Among Adolescents Living in a Tobacco-Producing Region*, 21 ADDICTIVE BEHAV. 349, 349 (1996). In addition, nearly one third of "all human cancer is believed [to be] caused by cigarette smoking." *Id.*

Data compiled by the U.S. Department of Health and Human Services revealed that "3,000 young people begin smoking daily, that 1,000 will die prematurely as a result, and that the numbers are rising. Other data indicate that the average teenage smoker begins at 14 and is a daily smoker by age 18." Colette Fraley, *Legal Issues Likely To Impede Clinton Plan on Teen Smoking*, CONG. Q., Aug. 12, 1995, at 2446.

261. Of the 228 SLAPP cases reported on by Pring in 1989, six percent related to consumer protection issues. Pring, *supra* note 208, at 9.

262. GLANTZ ET AL., *supra* note 2, at 12.

is hard to imagine how those documents might not influence public dialogue and legal questions about regulating tobacco. Judge Pollak, in fact, observed "an overwhelming public interest in those documents."²⁶³

Rather than launch a frontal attack on the public issue question and argue that the documents did not involve speech about a matter of public concern, Brown & Williamson contended that it "in no way attempted to chill the University's expression of its opposition to B & W and its production of tobacco."²⁶⁴ It contended that UCSF's "[f]reedom to speak about tobacco-related issues has not and will not be restrained or chilled by the filing or resolution of this lawsuit."²⁶⁵

This argument is sophisticated and accurate, as far as it goes. Even if UCSF was forced to give back the documents, Glantz and his colleagues still could rail against the tobacco industry. Their voices in the escalating dialogue about perceived evils of cigarettes and snuff could not be silenced by the return of sheets of paper—that much is true.

Brown & Williamson's argument omits, however, the fact that the *quality* of public dialogue would be hindered by the return of the papers. Information would be excluded (assuming all copies were returned) from the public's reach. The exclusion would deprive ordinary citizens concerned about dangers of smoking and tobacco industry antics, individuals seeking to join the dialogue, of vital information. The documents contain the kind of information that Alexander Meiklejohn might have described as vital to "the voting of wise decisions."²⁶⁶ Voters, Meiklejohn counseled, "must be made as wise as possible."²⁶⁷ An under-informed or un-informed dialogue raises serious First Amendment policy concerns.²⁶⁸

The United States Supreme Court acknowledged this argument in *First National Bank of Boston v. Bellotti*.²⁶⁹ It reasoned that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of informa-

263. Court Transcript of May 25, 1995 Hearing at 25, *Regents of Univ. of Cal.* (No. 967298).

264. Opposition to Defendant's Special Motion to Strike Complaint at 5, *Regents of Univ. of Cal.* (No. 967298).

265. *Id.*

266. MEIKLEJOHN, *supra* note 154, at 26.

267. *Id.*

268. For a thoughtful argument that quality public debate should be the defining force and goal in determining the extent of government intervention and regulation in the marketplace of ideas, see Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1417 (1986).

269. 435 U.S. 765 (1978) (holding that corporations have a First Amendment right to make expenditures for the purpose of influencing a vote because it furthers the societal interest in the free flow of commercial information).

tion from which members of the public may draw."²⁷⁰ This argument reflects a positive conception of First Amendment freedoms. The First Amendment provides a positive freedom *for* informational access and receipt of information. Its guarantees are not limited to a negative freedom, a freedom *from* government censorship.

For instance, the Supreme Court observed in *Griswold v. Connecticut* that the First Amendment's "freedom of speech and press includes not only the right to utter or to print, but . . . the right to receive."²⁷¹ Without such a peripheral right, the Court observed, "the specific rights [in the First Amendment] would be less secure."²⁷²

In *Richmond Newspapers, Inc. v. Virginia*, a case involving access to courtrooms, Chief Justice Warren Burger observed that "[f]ree speech carries with it some freedom to listen."²⁷³ Justice William Brennan, concurring in *Richmond*, emphasized the First Amendment "assumption that valuable public debate—as well as other civic behavior—must be informed."²⁷⁴

What Brown & Williamson sought was an order that, in the words of the *Bellotti* Court, would limit "the stock of information from which members of the public may draw."²⁷⁵ The company wanted to keep information out of public reach. Without public access to the information, however, debate about regulations on tobacco products would be less informed, less honest, and more speculative. Debate about issues of public concern must be more than "uninhibited, robust, and wide-open,"²⁷⁶ it must be informed.²⁷⁷

Thus, the tobacco company's argument that speech would not be chilled by a court order for the return of the documents misses the mark. Public debate would be limited. Although people could still speak, speculation, hearsay, and rumors would replace reasoned argument.

270. *Id.* at 783.

271. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (holding a Connecticut statute forbidding the use of a contraceptive as violative of the right to privacy inferred in the Constitution).

272. *Id.* at 482-83.

273. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

274. *Id.* at 587 (Brennan, J., concurring).

275. *First Nat'l Bank*, 435 U.S. at 783.

276. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

277. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

iii. The "typical" target?

The Brown & Williamson lawsuit protected the business interests of the plaintiff. It targeted speech about issues of public concern. It affected debate about those issues. Thus, the Brown & Williamson lawsuit had a number of SLAPP-like characteristics.

The target of the lawsuit, however, was atypical of a SLAPP suit. The University of California is a major public university replete with its own in-house attorneys ready to fight a major battle.²⁷⁸ This lawsuit conflicts with Pring's observation that SLAPP targets are typically "normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making."²⁷⁹

Nevertheless, this fact does not preclude the case from SLAPP status. A major media entity, like a newspaper, may be the target of a SLAPP suit.²⁸⁰ Furthermore, an argument can be made that the University was little more than a surrogate acting on behalf of average citizens. It was simply making available to people information directly concerning their health and safety. The University was fulfilling its duty on behalf of California taxpayers to spread knowledge and information.²⁸¹ Viewed in this light, the University is merely a stand-in for the common person.

d. Conclusion: A new breed of SLAPP?

This analysis suggests that B & W subjected the University to a SLAPP suit. The company, guarding its business interests, filed suit against UCSF. It tried to stifle informed public debate on important health issues by suppressing information that carried enough power to change federal regulations affecting Big Tobacco.²⁸² Brown & Williamson attempted to remove debate about the contents of the documents from the court of public opinion to the court of Judge Pollak. As Pring observed in considering a successful SLAPP suit's impact, "One set of interests has successfully transformed a public, political-arena debate into a private, judicial-arena adjudication."²⁸³

278. Christopher Patti, who argued the University's case before Judge Pollak, is in-house counsel for the University of California. See *Irresistible Forces*, CAL. LAW., Mar. 1996, at 26, 34 (providing a brief biography of Patti).

279. Pring, *supra* note 208, at 3.

280. See *supra* note 251 and accompanying text.

281. CAL. CONST. art. IX, § 1 (encouraging a "general diffusion of knowledge and intelligence").

282. See *supra* notes 112-34 and accompanying text.

283. Pring, *supra* note 208, at 12; see also Canan et al., *supra* note 209, at 929 (providing that "SLAPPs, by definition, are efforts to transform claims made in a public, political arena into legal claims in order to reduce or eliminate their potential damage").

For Brown & Williamson, however, it was not a successful SLAPP. Rather than back down and return the documents, the University fought the legal battle necessary to keep the information in the public realm. Although the battle temporarily moved into a San Francisco courtroom as Brown & Williamson desired, today Brown & Williamson fights on multiple fronts. The documents provided powerful evidence against the company in a recent \$750,000 jury verdict against the corporation in Florida.²⁸⁴ It may be too late, to paraphrase Judge Pollak's statement during oral argument, to SLAPP the genie back in the bottle.²⁸⁵

3. The World Wide Web as Strategic Litigation Weapon

A legal battle that transpires in Silicon Valley's front yard is not complete without a high technology angle. The Brown & Williamson fight with UCSF featured just this twist. It was not, however, the type of technology question usually associated with legal issues in the world of Apple, Oracle, and Adobe. It did not involve an intellectual property question of copyrights, patents, or software development. Instead, it featured the potential use of the Internet and, in particular, the graphics-rich portion of the Internet known as the World Wide Web (Web), by the University as a weapon against Brown & Williamson.

The parties neither fully briefed, nor formally argued as a separate issue, the use of the Web as a legal tool by UCSF.²⁸⁶ That issue arose, however, during oral argument by Barbara Caulfield, counsel for Brown & Williamson, at the crucial May 25, 1995, hearing.²⁸⁷

Caulfield's high technology concern? That UCSF would post the pilfered documents on the Web, thereby making them accessible for downloading by attorneys involved in other litigation against Brown & Williamson.²⁸⁸ In addition, Caulfield feared that disclosure of the documents on

284. Mark Curriden, *A Fortress Up in Smoke*, A.B.A. J., Oct. 1996, at 30.

285. See Court Transcript of May 25, 1995 Hearing at 60, *Regents of Univ. of Cal.* (No. 967298).

286. Brown & Williamson touched on the issue of using the Web as a strategic litigation weapon briefly in its written arguments. For instance, attorneys for the tobacco company argued that the "case is a stark demonstration of why such an action [for conversion] is necessary in the age of the information superhighway." Reply Memorandum of Points and Authorities in Support of Application for Writ of Possession at 1, *Regents of Univ. of Cal.* (No. 967298).

287. See Court Transcript of May 25, 1995 Hearing at 18, *Regents of Univ. of Cal.* (No. 967298).

288. See *id.*

the Web would defeat whatever attorney-client privileges might protect them in other litigation.²⁸⁹ As Caulfield told the judge:

[W]e come to this court, as an equity court, to try to say we would like to have the day in court that is allowed under the privilege laws without having theft take away the privilege. Because in the information superhighway, your honor, once this document is stolen, it goes on the Internet. There isn't a privilege that exists.²⁹⁰

Caulfield also analogized the Brown & Williamson situation to one involving the disclosure of trade secrets on the Web.²⁹¹ She claimed that the attorney-client privilege, a discovery and litigation privilege, created a property right in the copies of the documents analogous to a trade secret property right.²⁹² Caulfield argued:

[I]f this was a formula for Coca-Cola, that had this been stolen and given to the library and the library was going to put it on the Internet, the question would be can you disseminate as to property rights like that? We are stating the same analysis. And the courts have repeatedly said no. But there is a property right in that formula. There is a property right in reserve, that one student does [sic] that can't be stolen and disseminated. What we are saying is that there is a property right in privilege.²⁹³

Judge Pollak, as noted earlier, rejected the argument that the attorney-client privilege created a property right in the documents.²⁹⁴ He emphasized, however, that his decision did not preclude Brown & Williamson from attempting to exclude those documents in other cases under the attorney-client privilege and work product doctrine.²⁹⁵

The real problem with posting the documents on the Web was *not* that it might create a waiver of protected privileges.²⁹⁶ Brown & Williamson's claim of the attorney-client privilege in its litigation against UCSF was enough under California law to prevent a waiver of that privi-

289. See *id.* This possibility is somewhat questionable. Brown & Williamson, as holder of whatever attorney-client privilege might protect the documents, did *not* consent to the disclosure of the information in its documents. See CAL. EVID. CODE § 912 (West 1995) (providing waiver of attorney-client privilege by disclosure). Under California law, "[c]onsent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." *Id.* By arguing the existence of the privilege against UCSF, Brown & Williamson clearly had not failed to claim the privilege.

290. Court Transcript of May 25, 1995 Hearing at 18, *Regents of Univ. of Cal.* (No. 967298).

291. *Id.* at 31.

292. *Id.*

293. *Id.*

294. *Id.* at 54.

295. *Id.* at 61.

296. See *id.*

lege.²⁹⁷ It could litigate the application of the privilege in other fora.²⁹⁸ Instead, the real danger lay in the public dissemination of the information contained in those documents.

Even if a *document* could be excluded as evidence in another case against Brown & Williamson, the *information* contained in that document would still be known by opposing counsel if UCSF were allowed to put it on the Web. That information, in turn, could shape in-court arguments, lead investigators and jurors down otherwise untaken paths, and influence federal regulation of the tobacco industry.

Furthermore, there is no guarantee that the documents will be excluded on privilege grounds in other arenas. They can be downloaded by plaintiffs' attorneys directly off the Web and admitted into evidence over objections by counsel for Brown & Williamson. Indeed, a Florida court admitted the documents into evidence for the first time in a 1996 trial in which a jury rendered a \$750,000 verdict against Brown & Williamson.²⁹⁹

The harm to Brown & Williamson caused by posting the documents on the Web is thus not confined to the litigation with UCSF. The harm proliferates in other fora and in other cases, pending or potential, against the tobacco company. Posting documents on the Web increases the speed, accessibility, and ease with which otherwise privileged information is disseminated to tobacco-hostile counsel. Attorneys litigating against Brown & Williamson can take short cuts around normal discovery procedures to receive those documents. For example, by using a Web browser like Netscape, opposing counsel can link to a UCSF site to find the documents.³⁰⁰

Today, after Judge Pollak's decision against Brown & Williamson, such a site exists.³⁰¹ This site is a cache packed with powerful ammunition for plaintiffs' attorneys suing the tobacco industry and for numerous states' attorneys general pouncing on the beleaguered industry. That cache can be obtained free of charge and free of hassle by anyone.

297. See CAL. EVID. CODE § 912(a) (West 1995) (providing that failure to claim a privilege in any proceeding in which the holder of that privilege has legal standing and the opportunity to claim it may constitute a waiver of the privilege).

298. See Court Transcript of May 25, 1995 Hearing at 61, *Regents of Univ. of Cal.* (No. 967298).

299. Curriden, *supra* note 284, at 30.

300. GLANTZ ET AL., *supra* note 2, at 11. The documents can be accessed for free on the Web at <<http://www.galen.library.ucsf.edu/tobacco/>>.

301. GLANTZ ET AL., *supra* note 2, at 11.

Plaintiffs' attorneys need not concern themselves with discovery disputes to access them.

Indeed, this scenario was borne out in the already mentioned Florida case in which Grady Carter, a sixty-six year old retired air traffic controller who started smoking Lucky Strikes in 1947, recovered a \$750,000 jury verdict against Brown & Williamson.³⁰² Norwood Wilner, Carter's attorney, observed that the Brown & Williamson documents posted on the Web were powerful evidence in the case: "We had all we needed in the Brown & Williamson documents, which are now available on CD-ROM and all over the Internet."³⁰³

The Web, then, is a powerful litigation weapon. Rapid transmission of large amounts of documents in a matter of seconds is now possible. The impact of the information in those documents will be felt for years to come in litigation across the country. The Web facilitates disclosure of privileged information, such as medical examination records of a psychotherapist's patient³⁰⁴ or the details of a rape victim's trauma as described to a sexual assault counselor, to a mass audience.³⁰⁵

Damage done by disclosure of a rape victim's confidential communications with her counselor can never be rectified by an in-court order excluding those documents as evidence in a particular case. Out-of-court Web postings may reveal intensely private information. The injuries, affronts to dignity, autonomy, and privacy, cannot be undone by a judge's order. Those harms are more egregious than any monetary loss to purveyors of nicotine-laced products.

Regents of University of California, then, only scratches the surface as to the power of the Web as a strategic litigation weapon to evade or circumvent privileges. Documents posted on the Web can facilitate massive actions across the country that target a particular defendant such as Brown & Williamson. They can also cause irreparable injury to truly innocent victims of circumstance, such as rape victims.

C. *Synopsis of Legal Issues*

Part I analyzes three distinct legal and public policy issues raised in *Regents of University of California*, the applicability of First Amendment scrutiny to generally applicable state tort laws that do not target speech, SLAPP suits, and the use of the World Wide Web as a strategic

302. Curriden, *supra* note 284, at 30.

303. *Id.* (quoting attorney Wilner).

304. See CAL. EVID. CODE §§ 1010-1027 (West 1995) (providing California statutory authority on the psychotherapist-patient privilege).

305. See *id.* §§ 1035-1036.2 (providing California statutory authority on the sexual assault victim-counselor privilege).

litigation weapon.³⁰⁶ Within these issues, the Article examines questions about academic freedom, informed public debate, and privacy claims.³⁰⁷

It would be a mistake, however, to consider only the legal issues raised in the case. Part II of this Article places the battle within a larger economic and social context, exploring issues of media conglomeration, self-censorship, and the public service role of universities.³⁰⁸ The lawsuit between Brown & Williamson and UCSF is compared with recent legal disputes between major media news organizations and cigarette companies. A better understanding of the importance of the UCSF case is understood when placed within a larger context.

II. CONTEXTUALIZING THE LEGAL BATTLE: THE DIVERGENT PATHS OF UCSF AND ABC/CBS

Around the same time that the University of California was slugging it out in court with Brown & Williamson, two major television news organizations, ABC and CBS, were scurrying for shelter in their respective fights with Big Tobacco. In particular, ABC settled for several million dollars in attorneys' fees and an apology in a defamation action brought by Philip Morris over two "essentially correct"³⁰⁹ television broadcasts about tobacco reconstitution, while CBS pulled a story attacking the tobacco industry from an episode of *60 Minutes*.³¹⁰ Mickey Mouse, it seemed, was scampering loose around the ABC newsroom, and Westinghouse was generating more than nuclear power over at CBS.³¹¹

306. See *supra* Part I.B.

307. *Id.*

308. See *infra* Part II.

309. HILTS, *supra* note 40, at 114.

310. See *infra* notes 316-55 and accompanying text.

311. Walt Disney Co. revealed its plans to take over Capital Cities/ABC, Inc. on July 31, 1995. Laura Landro et al., *Disney's Deal for ABC Makes Show Business a Whole New World*, WALL ST. J., Aug. 1, 1995, at A1. The network settled the defamation action filed against it by Philip Morris Co. less than one month later. John Schwartz, *ABC Issues Apology for Tobacco Report*, WASH. POST, Aug. 22, 1995, at A1. See generally George Garneau, *Disney Enters News Business*, EDITOR & PUBLISHER, Aug. 5, 1995, at 5 (providing a summary of Disney's takeover of Capital Cities/ABC). On August 1, 1995, just one day after the announcement of the Disney-ABC deal, Westinghouse Electric Corp. agreed to pay \$5.4 billion for CBS, Inc. Allan Wolper, *Veteran Journalist Takes on Westinghouse*, EDITOR & PUBLISHER, Sept. 16, 1995, at 17. Westinghouse is "involved in a wide range of enterprises, including the development of nuclear power." *Id.*

This portion of the Article contrasts the aggressive First Amendment defense of the University of California in its fight with Brown & Williamson with the less than courageous actions of two major news organizations in their respective battles with Philip Morris and Brown & Williamson. It analyzes dangers posed to investigative journalism by the growing "conglomeration juggernaut"³¹² and by rising bottom-line pressures imposed by mega-media corporations that conflict with the ideals of hard-hitting reportage.³¹³ It suggests that when litigious entities like tobacco companies are the targets of potentially damaging news coverage, major media outlets can no longer be counted on to deliver important information. Instead, public universities like the University of California, that face continuing budget crises, may be the last avenue of information dissemination on those subjects. The situation, in a nutshell, is ominous.

It is not sufficient to view in a vacuum legal issues that affect information flow about events of public concern. Instead, these issues must be considered within the broader economic framework that often influences their resolution. That financial framework increasingly privileges out-of-court resolution of legal disputes long before expenses for their in-court resolution are incurred.

ABC, for instance, settled a case with Philip Morris before trial that caused Harvard constitutional law scholar Laurence Tribe to remark that "[a]nybody with half a brain would advise [ABC] that at the end of the road they will prevail."³¹⁴ He observed that the settlement, however, "made economic sense" if the network and its owners were concerned "purely with the corporate bottom line."³¹⁵

The dispute in *Philip Morris Cos. v. ABC*³¹⁶ stemmed from two companion segments of the since-canceled ABC newsmagazine *Day One*, broadcast in February and March 1994.³¹⁷ The reports, which won a prestigious George Polk Award for excellence in journalism,³¹⁸ focused on the process of tobacco reconstitution and nicotine manipulation in

312. Gitlin, *supra* note 35, at 1.

313. A journalist's goals do not include providing corporate owners with massive dividends. "The only relevant issue in journalism is whether the editorial product is as honest as fair-minded people can make it, as balanced as possible, as untainted by either corporate bias or personal bias." NORMAN E. ISAACS, *UNTENDED GATES: THE MISMANAGED PRESS* 154 (1986).

314. Howard Kurtz, *Long-Term Effect of ABC Settlement Concerns Critics*, WALL ST. J., Aug. 23, 1995, at A4.

315. *Id.*

316. 23 Media L. Rep. (BNA) 2438 (Va. Cir. Ct. 1995).

317. *Day One: Smoke Screen* (ABC television broadcast, Feb. 28, 1995); *Day One: Smoke Screen, Part Two* (ABC television broadcast, Mar. 7, 1994).

318. Kurtz, *supra* note 314, at A4.

the production of cigarettes.³¹⁹ Philip Morris filed a defamation action over the broadcasts.³²⁰ It contended that ABC, by using terms like "spiking" and "fortifying," falsely implied that Philip Morris added nicotine from extraneous, outside sources to its cigarettes.³²¹

ABC settled the case, agreeing to pay several million dollars in attorneys' fees to Philip Morris.³²² It also issued a narrowly drafted apology to Philip Morris that the tobacco company gladly republished in major newspapers throughout the country in full-page advertisements entitled "Apology Accepted."³²³ In addition, the network broadcast apologies on its *World News Tonight* and *Monday Night Football* programs.³²⁴ Sorry, in stark contrast to the unremorseful character in the Tracy Chapman ballad *Baby Can I Hold You*, was all that ABC could say.³²⁵

319. Weinberg, *supra* note 27, at 33.

320. *Philip Morris Cos.*, 23 Media L. Rep. (BNA) 2438.

321. *Id.* at 2439.

322. Mark Landler, *ABC Settles Suits on Tobacco*, N.Y. TIMES, Aug. 22, 1995, at A1. Some estimates of the total attorneys' fees range from \$15 to \$20 million. Alix M. Freedman & Elizabeth Jensen, *Capital Cities, Philip Morris Settle Lawsuit*, WALL ST. J., Aug. 22, 1995, at A3.

323. Weinberg, *supra* note 27, at 29. Philip Morris ran the apology/advertisement in approximately 700 publications. *Id.* at 31. The apology, however, was narrowly tailored and limited in the scope of error admitted by ABC. It provided in pertinent part:

We [ABC] now agree that we should not have reported that Philip Morris adds significant amounts of nicotine from outside sources. That was a mistake that was not deliberate on the part of ABC, but for which we accept responsibility and which requires correction. We apologize to our audience and Philip Morris.

ABC and Philip Morris continue to disagree about whether the principal focus of the reports was on the use of nicotine from outside sources. Philip Morris believes that this was the main thrust of the programs. ABC believes that the principal focus of the reports was whether cigarette companies use the reconstituted tobacco process to control the levels of nicotine in cigarettes in order to keep people smoking. Philip Morris categorically denies that it does so. ABC thinks the reports speak for themselves on this issue and is prepared to have the issue resolved elsewhere.

Id.

324. Alix Freedman et al., *Why ABC Settled with the Tobacco Industry*, WALL ST. J., Aug. 24, 1995, at B1.

325. See TRACY CHAPMAN, *Baby Can I Hold You*, on TRACY CHAPMAN (Elektra/Asylum Records 1988) (singing "[s]orry is all that you can't say/years gone by and still words don't come easily/like sorry like sorry").

Author and *New York Times* reporter Philip J. Hilts observed that ABC's decision to settle and to apologize "was not a legal decision, but a business judgment. In fact, the odds of winning for ABC were rather good, for reasons not made public at the time. And ABC lawyers had tested their arguments and theories before two mock juries in the South, and had won."³²⁶ ABC even won a critical discovery motion protecting the identity of its confidential sources, including one fittingly dubbed "Deep Cough."³²⁷

Communication scholar and media gadfly Marshall McLuhan once remarked that the "medium is the message."³²⁸ It appears that today some members of the broadcast news media are on the verge of conveying a new, equally profound message: *settlement is the solution*.

First Amendment scholar Rodney Smolla observed that "[c]orporate officers or lawyers who advise [the media] are looking at the bottom line and the huge expense of playing this litigation out versus the cheapness of the apology."³²⁹ He suggested the ABC apology may have a slippery slope effect. "People will start to see [apologizing] as a way of getting out of a problem they're in."³³⁰

From a journalist's perspective, however, the price of an apology is not cheap. It is paid in a loss of public trust. Although an apology averts monetary losses, credibility and integrity, a reporter's stock in trade, are irreparably damaged.³³¹ Reese Cleghorn, president of the *American Journalism Review*, lamented that the ABC settlement "hurts all of us, and it is devastating to ABC's credibility."³³² He concluded that the set-

326. HILTS, *supra* note 40, at 114.

327. Clay Calvert, *The Reporter's Privilege vs. The Corporate-Interest Muzzle*: Philip Morris Cos. v. ABC, Inc., 22 U. DAYTON L. REV. (forthcoming 1997).

328. MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 23 (2d ed. 1964). McLuhan's famous quotation, placed in more complete context, is:

In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium—that is, of any extension of ourselves—result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology.

Id.

329. Patricia G. Barnes, *Who's Sorry Now: Media Defendants' High-Profile Apologies Are Cheaper Than Litigation*, A.B.A. J., Jan. 1996, at 20 (alteration in original).

330. *Id.*

331. It should be emphasized that neither Walt Bogdanich, the producer of the ABC *Day One* episodes at issue in the dispute with Philip Morris, nor John Martin, the correspondent for those segments, signed the settlement agreement. Freedman et al., *supra* note 324, at B1.

332. Reese Cleghorn, *Cigarette Settlement Shames ABC*, AM. JOURNALISM REV., Oct. 1995, at 4, 4.

tlement reveals "how ominous the corporatization of the news has become."³³³ In another article about the ABC capitulation, the *American Journalism Review* reported that ABC news staff members are "worried that the bottom-line mentality of corporate owners puts investigative journalism at risk."³³⁴

In their 1997 book about influences on the news media, communication scholars Kathleen Hall Jamieson and Karlyn Kohrs Campbell observed that the ABC settlement "aroused fears among employees that ABC might no longer be as vigilant in protecting news, particularly since Capital Cities had been acquired by the Walt Disney Company."³³⁵ Jamieson and Campbell suggest that Philip Morris's success in obtaining an apology from ABC "will make other news outlets more cautious in their coverage of these issues."³³⁶

The damage caused by settlements like ABC's extends beyond harm to the journalism profession. The public is harmed. Bill Kovach, curator of the Nieman Foundation at Harvard, observed that the "damage done is not just to the credibility of ABC's news operation and the chilling effect it might have on aggressive reporting. There's also the impact on society. This slows down a movement in the country to question whether or not cigarettes should be treated as a drug."³³⁷

The danger extends far beyond the tobacco issue. This issue jeopardizes coverage of other matters that impact the public health, safety, and welfare. The battle with Big Tobacco is simply symptomatic of a potentially larger problem of self-censorship at broadcast news organizations.

Philip Hilts reports in his new book, *Smokescreen: The Truth Behind the Tobacco Industry Cover-up*,³³⁸ a particularly dramatic and damning allegation of self-censorship at ABC after Philip Morris filed its defamation action against the network.³³⁹ Citing as his source an anonymous ABC executive involved on the Philip Morris investigation, Hilts suggests that ABC ignored information in the Brown & Williamson papers, the

333. *Id.*

334. Robert Lissit, *The Uneasy Aftermath of the ABC Settlement*, AM. JOURNALISM REV., Oct. 1995, at 8, 8.

335. KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA* 145 (4th ed. 1997).

336. *Id.* at 146.

337. Kurtz, *supra* note 314, at A4.

338. HILTS, *supra* note 40.

339. *Id.* at 120.

same documents containing the same information that Stanton Glantz and the University of California exposed for all to see.³⁴⁰ Hilts writes:

[B]ecause of the Philip Morris suit, fear ruled. The executive said that Alan Braverman, in-house counsel for ABC, said not only that ABC should not report on the [Brown & Williamson] papers, but in an action that stunned those in the business, the papers were confiscated from news staff. They were ordered to erase their computer notes about the papers.³⁴¹

This allegation, if true, is deeply troubling. In fairness to ABC, however, it must be noted that the network is "currently in the process of vigorously defending a number of cases, such as the *Food Lion* suit over a 1992 *Prime Time Live* hidden camera report alleging the supermarket chain tricked customers into buying spoiled meat, fish, and poultry."³⁴² On the other hand, attacking one supermarket chain is different than going after one of the most reviled and powerful industries today, tobacco. *A new rule may be emerging—the power and economic resources of the target dictate the nature and extent of coverage and investigation.*

ABC's debacle with Philip Morris is not the only recent example of media capitulation to a tobacco company. Another involved CBS's flagship television news magazine *60 Minutes* and a foe not unknown to University of California, Brown & Williamson Tobacco Corp.³⁴³ As described in Part I of this Article, *60 Minutes* canceled a segment that featured an interview with a former Brown & Williamson executive, Jeffrey Wigand, for fear of monetary liability.³⁴⁴ Alix M. Freedman, the *Wall Street Journal* reporter who has been called "likely the number one tobacco reporter in the country,"³⁴⁵ observed that the incident "has been interpreted as a textbook case of how the \$45 billion tobacco industry chills the media or, more precisely, its lawyers."³⁴⁶

340. *Id.*

341. *Id.*

342. Lissit, *supra* note 334, at 8. See *Food Lion, Inc. v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D.N.C. 1995) (denying ABC's motion to dismiss trespass, intentional misrepresentation, deceit, fraud, and related causes of action based on the conduct of two producers for ABC's *Prime Time Live* newsmagazine who submitted false employment applications with bogus work histories to Food Lion stores and who Food Lion hired as meat packers).

343. For a recent analysis of both the CBS fight with Brown & Williamson and the defamation action Philip Morris brought against ABC that searches for the causes of the networks' cowardice, see Clay Calvert, *Stumbling Down Tobacco Road: Media Self-Censorship and Corporate Capitulation in the War on the Cigarette Industry*, 30 LOY. L.A. L. REV. 139 (1996).

344. See generally Grossman, *supra* note 26, at 39-51 (providing an excellent overview of the *60 Minutes* fiasco).

345. HILTS, *supra* note 40, at 145.

346. Freedman et al., *supra* note 3, at A1.

CBS faced potential liability over the interview not because of the substance of what Wigand said, but rather because of the manner in which CBS induced him to talk.³⁴⁷ Wigand had a nondisclosure contract with Brown & Williamson that forbade him from speaking about the company.³⁴⁸ CBS agreed to indemnify Wigand, however, against a libel suit that might result from his interview with Mike Wallace.³⁴⁹ The network had previously paid Wigand \$12,000 for consulting work on another report for *60 Minutes*.³⁵⁰ In addition, he "was promised by CBS that his interview wouldn't be aired without his permission."³⁵¹

After completing the interview with Wigand, CBS attorneys ordered the segment off the air.³⁵² The network's attorneys and outside counsel specializing in First Amendment cases feared monetary liability under the tort theory of intentional interference with contractual relations.³⁵³

The print media bashed CBS for its actions. *The New York Times* opined that "[t]his act of self-censorship by the country's most powerful and aggressive television news program sends a chilling message to journalists investigating [tobacco] industry practices everywhere."³⁵⁴ The newspaper's editorial added that:

the most troubling part of CBS's decision is that it was made not by news executives but by corporate officers who may have their minds on money rather than public service these days. With a \$5.4 billion merger with the Westinghouse Electric Corporation about to be approved, a multi-billion-dollar lawsuit would hardly have been a welcome development.³⁵⁵

Thus, the actions of ABC and CBS diverge markedly from the path steered by the University of California and its attorneys. The next section describes the growing conglomeration craze that portends more self-censorship in service of corporate profits at major media news outlets.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. Bill Carter, '60 Minutes' Ordered to Pull Interview in Tobacco Report, N.Y. TIMES, Nov. 9, 1995, at A1.

353. DeVore, *supra* note 100, at B2; see *supra* notes 88-89 and accompanying text (describing the legal basis and elements of the theory of intentional interference with contractual relations).

354. *Self-Censorship at CBS*, *supra* note 102, at E14.

355. *Id.*

A. *The Conglomeration Catastrophe*

In *Inventing Reality: The Politics of News Media*,³⁵⁶ Michael Parenti launches a blistering attack on United States media with the observation that "[w]e do not have a free and independent press in the United States but one that is tied by purchase and persuasion to wealthy owners and advertisers and, subjected to the influences of state power."³⁵⁷ It is the purchase and persuasion of wealthy owners that is most troubling today when Disney owns ABC, General Electric controls NBC, Westinghouse takes over CBS, and Time Warner, Inc., merges with Turner Broadcasting.

Conglomerates with diversified portfolios that include both media and non-media holdings and media entities with concentrated ownership raise serious concerns. As Leo Bogart, former executive vice president and general manager of the Newspaper Advertising Bureau, recently observed, "Concentration in other industries may lead to market power, oligopolistic pricing and restrictive trade practices. In the media business, it can change the country's values, ideas and politics, perhaps even the national character."³⁵⁸ Todd Gitlin, professor of culture, journalism, and sociology at New York University, concurred. He emphasized that

mergers are taking place amid a deafening silence. Trusts with the capacity for overbearing power are being merged and acquired into existence as if there were nothing at stake but stock values. Today's deals may weigh on the culture for decades. The potential for harm is at least as impressive as the potential for good.³⁵⁹

This section focuses narrowly on one change that conglomeration and concentration of ownership portend: a change in the selection and portrayal of news at media organizations owned by large chains and corporate conglomerates. The change, in a nutshell, is increased self-censorship in service of bottom-line interests.

Professor Louis A. Day of Louisiana State University observed in his recent book on media ethics that "[p]erhaps the most serious threat to media institutional independence is the trend toward ownership by outside corporations that have no commitment to the journalistic imperative and spirit. The bottom line often takes precedence over content quality, which is measured by its profitability."³⁶⁰ Emphasizing a similar con-

356. MICHAEL PARENTI, *INVENTING REALITY: THE POLITICS OF MASS MEDIA* (2d ed. 1993).

357. *Id.* at 4.

358. Leo Bogart, *What Does It All Mean?*, *MEDIA STUD. J.*, Spring-Summer 1996, at 15.

359. Gitlin, *supra* note 35, at 6.

360. LOUIS A. DAY, *ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES* 216

cern, Davis Merritt, a public journalism advocate and practitioner, stated in a new book on public journalism that "[a]s more and more newspapers have been acquired by public companies, operating those companies has become a delicate balancing act between civic responsibility and hard fiscal realities."³⁶¹

Disney almost certainly did not purchase ABC to improve the quality of the news operation or to "beef up" investigative journalism. Rather, as Ken Auletta wrote in a recent edition of the *Media Studies Journal*, the "blizzard of mergers and partnerships [in the communications industry] is motivated by good business reasons."³⁶²

How do "outside" corporate parents influence selection and portrayal of news? How do conglomerates make it more difficult for reporters and editors to adhere to the admonition set forth in the Society of Professional Journalists' Code of Ethics that "[j]ournalists must be free of obligation to any interest other than the public's right to know"?³⁶³ How do corporate conglomerates' needs create conflicts of interest that jeopardize a journalist's obligations of truth-telling and independence?³⁶⁴ Is the influence the product of direct intervention and edicts by executives to editors and reporters, or is the influence the result of less brutal means?

Bogart argues that the process is often "subtle and indirect."³⁶⁵ He observed that

[f]ew media overlords are so crude as to give direct orders to kill or slant stories. They do not have to do that in order to let it be known that their views are where their interests lie. Almost imperceptible Pavlovian cues reinforce desired behavior and inhibit what is unwelcome.³⁶⁶

(2d ed. 1997).

361. DAVIS MERRITT, *PUBLIC JOURNALISM AND PUBLIC LIFE: WHY TELLING THE NEWS IS NOT ENOUGH* 41 (1995).

362. Ken Auletta, *Fourteen Truisms for the Communications Revolution*, *MEDIA STUD. J.*, Spring-Summer 1996, at 29, 30.

363. DAY, *supra* note 360, at 421.

364. JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES* 17 (2d ed. 1995). Ethicist Jay Black observes that conflicts of interest arise when individuals face competing loyalties "to their organization's economic needs as opposed to the information needs of the public." *Id.* at 91.

365. Bogart, *supra* note 358, at 22.

366. *Id.*

Ben Bagdikian, former dean of the graduate journalism program at University of California, Berkeley, concurs on the danger of indirect influence on editorial content.³⁶⁷ He noted in *The Media Monopoly* that

the gravest loss is in the self-serving censorship of political and social ideas, in news, magazine articles, books, broadcasting, and movies. Some intervention by owners is direct and blunt. But most of the screening is subtle, some not even occurring at a conscious level, as when subordinates learn by habit to conform to owners' ideas.³⁶⁸

Newsweek media critic Jonathan Alter, analyzing the potential impact of Disney's takeover of ABC, observed that "[i]n a tight job market, the tendency is to avoid getting yourself or your boss in trouble. So an adjective gets dropped, a story skipped, a punch pulled."³⁶⁹ In the case of conglomerates with diverse holdings, there are many "bosses" journalists must avoid getting in trouble. As Bogart stated, "The larger and more diversified the company, the greater and the more varied the corporate interests that may be threatened by crusading journalism."³⁷⁰ In brief, there are massive incentives for journalists to tread lightly on, or even to ignore, topics that may negatively affect their own financial security and the balance sheets of their parent corporations.

Corporate pressures, magnified in this era of rapid conglomerization, threaten the hallmark of journalism—objectivity.³⁷¹ The pressure upon journalists to slant stories that favor a corporate parent or to exclude information that might cause it harm continues to increase.

Writing in *The New Yorker* shortly after Disney's takeover of ABC, Ken Auletta explicated the tension and friction between the desires of Disney's top gun, Michael Eisner, and the news department at ABC.³⁷² Auletta wrote:

Eisner has no natural predilection for journalism. He tends to take a dim view of reporters; last week, he thanked several journalists for generally favorable pieces, as if they were choosing his side rather than just reporting his coup [the Capital Cities/ABC takeover], and he tends to freeze out those whom he views as critics. Now that Eisner will have responsibility for the most successful broadcast-news division as well as Cap Cities/ABC's newspapers and magazines—more than a

367. BAGDIKIAN, *supra* note 29, at 45.

368. *Id.*

369. Jonathan Alter, *A Call for Chinese Walls; Why We Should Keep Journalists out of the Magic Kingdom*, *NEWSWEEK*, Aug. 14, 1995, at 31, 31.

370. Bogart, *supra* note 358, at 24.

371. Objectivity means "news devoid of personal opinion and overly subjective judgments." EDMUND B. LAMBETH, *COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION* 59 (2d ed. 1992). For an excellent critique of the journalism practice of objectivity, see Theodore L. Glasser, *Objectivity Precludes Responsibility*, *QUILL*, Feb. 1984, at 13.

372. Ken Auletta, *Awesome: Michael Eisner's Comeback and His Probable Peace with Jeffrey Katzenberg Crown a Succession of Mogul Mergers and Breakups That Tops Anything on TV*, *NEW YORKER*, Aug. 14, 1995, at 28, 31.

hundred publications—the questions that are already being asked about him are these: Does he care about the news product, or only about profit margins? Does he feel some public-trust obligation—as ABC obviously did earlier this year [1995] when it broadcast a low-rated prime-time hour on the war in Bosnia because the story was important—or does he only track ratings? Will he find that news, with its attendant controversy and sometimes uncomfortable questions, detracts from the friendly Disney image?³⁷³

For his part, Eisner promises not to get involved with news issues at ABC. He told Auletta that “ABC News is the best news organization in the world. . . . I know it well. Roone Arledge has brought to ABC News the same kind of invention that he brought to ABC Sports. They will be left alone to operate autonomously.”³⁷⁴

Tension between business and editorial interests are not unique to Disney/ABC or Westinghouse/CBS. For instance, the recent dismissal of *New York* magazine Editor in Chief Kurt Anderson by leveraged buyout king Henry R. Kravis, whose K-III Communications Corporation had just taken over the publication, had all the signs of intrusion of ownership interests into the news room.³⁷⁵ Kravis objected to an article that Anderson decided to run about two of Wall Street’s most powerful investment bankers.³⁷⁶ Anderson’s dismissal, according to *New York* magazine film critic David Denby, “is the kind of thing that sends a chill throughout magazine journalism.”³⁷⁷

In summary, corporate conglomeration threatens the future of investigative journalism. The ABC and CBS incidents portend a dismal future for hard-hitting broadcast reportage. The full implications of decreased government regulation of media ownership³⁷⁸ and expanding

373. *Id.* at 31-32.

374. *Id.* at 32.

375. Robin Pogrebin, *When a Magazine is Too Brash for the Bottom Line*, N.Y. TIMES, Sept. 29, 1996, §3, at 1.

376. *Id.*

377. *Id.*

378. The Telecommunications Act of 1996 continues the 1980s movement toward ownership deregulation in the broadcast industry. See Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.A.N. (110 Stat.) 107 (to be codified at 47 U.S.C. § 336). First, it eliminates the cap on the number of AM and FM radio stations that one entity may own or control nationally and relaxes local ownership ceilings. *Id.* § 202(a)-(b), 1996 U.S.C.A.N. (110 Stat.) 110 (directing the Federal Communications Commission (FCC) to modify 47 C.F.R. 73.3555). Second, it eliminates the cap on the number of television stations that one person or entity may own, operate, or control nationally, while increasing the national audience reach limitation for television stations owned by one entity from 25 to 35 percent. *Id.* § 202(c) 1996 U.S.C.A.N. (110 Stat.) 111 (directing the FCC to modify 47 C.F.R. 73.3555). Third, it

conglomeration³⁷⁹ will not, however, be known until early in the next century. As the next section suggests, the trend may force the public to rely on alternative sources of information for news on controversial or "taboo" topics and targets.³⁸⁰ Universities, interested in fulfilling their public service missions and integrating service learning into the curriculum, may fill the void created by the broadcast media's abdication.³⁸¹

B. *Filling the Vacuum: Public Universities and Their Presses?*

If major broadcast news organizations owned by corporate conglomerates continue to cower in the face of expensive and time-consuming litigation,³⁸² the public will be substantially harmed. The result will be the suppression of information of public concern.³⁸³ That information, such as the systematically deceptive practices of the tobacco industry,³⁸⁴ may be vital for informed public dialogue on issues of public health, safety, and welfare.³⁸⁵ Without informed *dialogue*, informed *democracy* disintegrates.

Diversified corporate conglomerates with incidental news organizations that comprise only a small or incidental part of their total portfolio³⁸⁶ are likely to pull punches and spike stories when their journalists' investigations target specific businesses or issues. These "off limits" stories include investigations that center on the following: (1) wealthy, powerful, and litigious industries, such as Big Tobacco; (2) industries and/or corporations in which a news organization's own parent company has an ownership or operational interest, such as the nuclear power business in which both Westinghouse and General Electric, owners of CBS and NBC, respectively, have vested interests; and (3) hot-button, controversial issues that could lead to advertiser boycotts, thus decreasing revenue to a news organization's parent company.

The question that arises from this picture is simple but, unfortunately, its resolution is not. The question is: Who will investigate these indus-

permits a single person or entity to own or control a network of broadcast stations and a cable system. *Id.* § 202(f), 1996 U.S.C.C.A.N. (110 Stat.) 111 (directing the FCC to modify 47 C.F.R. 76.501).

379. See *supra* notes 29, 312 and accompanying text.

380. See *infra* notes 382-94 and accompanying text.

381. See *infra* notes 382-94 and accompanying text.

382. See, e.g., *supra* notes 27, 309-11, 314-25, 342-53 and accompanying text.

383. See, e.g., *supra* notes 35, 121-26 and accompanying text.

384. See *supra* notes 2, 6 and accompanying text.

385. See *supra* notes 15, 120-21, 143, 155-61, 260, 266-77 and accompanying text.

386. For instance, at "the post-merger ABC television network, the total profits of the news division are only 1 percent of the entire Disney company." Tom Wolzien, *The Big News-Big Business Bargain*, MEDIA STUD. J., Spring-Summer 1996, at 109, 110-11.

tries, corporations, and issues? Alternatively phrased, the query takes the form: Who will fill the investigative informational vacuum created by increasing corporate conglomerization?

The battle between the University of California and Brown & Williamson certainly suggests one possibility. Public universities, as well as major private post-secondary institutions, may replace the broadcast media as purveyors of information about topics and industries that the networks will not touch. UCSF was willing to fight the legal battle necessary to disseminate information of public concern. It took on the vigorous public service role that ABC and CBS were unwilling to fulfill. Is this the proper role for research universities? Should they fill the vacancy that may be left by self-censorship at broadcast news organizations? These are important questions as the broadcast news media appear on the verge of defaulting on their civic, albeit not legal, responsibility to inform the public.

1. The Service Mission and Service Learning

Part of the mission of public research universities is to conduct research that enlightens society.³⁸⁷ The goals of public and private universities clearly extend beyond hiring professors to generate research to be read by other professors in obscure academic journals buried deep in the stacks of overcrowded university libraries. Specifically, public universities have a service mission to their states and to the nation.³⁸⁸ Pennsylvania State University communication and pedagogy scholar Jeremy Cohen observed that "the language of service is rapidly gaining an institutional role on American campuses."³⁸⁹

The late Ernest L. Boyer, then-president of the Carnegie Foundation for the Advancement of Teaching and Knowledge, wrote in 1990:

387. See Roger L. Geiger, *Research Universities in a New Era: From the 1980s to the 1990s*, in *HIGHER LEARNING IN AMERICA: 1980-2000*, at 67, 83 (Arthur Levine ed., 1993) (stating that contemporary research universities have as their mission "advancing knowledge and providing excellence in education").

388. Public journalism guru Jay Rosen observed in a recent article on the role of professors as public intellectuals that "[t]he words on my department letterhead read: NEW YORK UNIVERSITY/A PRIVATE UNIVERSITY IN THE PUBLIC SERVICE." Jay Rosen, *Making Things More Public: On the Political Responsibility of the Media Intellectual*, *CRITICAL STUD. IN MASS COMM.*, Dec. 1994, at 363. Rosen then considered what public service means and what the proper role of the professorate is in light of the call to public service. *Id.*

389. Cohen, *supra* note 34, at 99.

Beyond the campus, America's social and economic crises are growing—troubled schools, budget deficits, pollution, urban decay, and neglected children, to highlight problems that are most apparent. . . . Given these realities, the conviction is growing that the vision of service that once so energized the nation's campuses must be given new legitimacy. The challenge then is this: Can America's colleges and universities, with all the richness of their resources, be of greater service to the nation and the world?³⁹⁰

Service, as Boyer suggests, is a natural function of a university. The question then becomes whether public service includes professors performing roles traditionally played by investigative journalists. In these roles, professors would continue to conduct research but with very different goals. Rather than running experiments for the sake of padding vitae and publishing them in dust-collecting journals for the tenure telos, professors would own up to what New York University's Jay Rosen calls the "political responsibility of intellectuals."³⁹¹

This role is particularly relevant for the professorate housed in journalism schools and communication departments. Application of their intellectual and professional skills in a forum outside the classroom to matters that directly impact the public health, safety, and welfare of local cities, communities, and college towns, provides an invaluable public service. Advanced seminars in print and broadcast reporting in which students collectively investigate issues of importance to the local community, such as environmental issues, public safety questions, or domestic violence problems, provide a bridge that spans the holy trinity of teaching, research, and service. They also create a classic opportunity for journalism students to engage in "service-learning."³⁹² Publication and dissemination of such university-sponsored, student- and faculty-produced investigative journalism serves a vital function for democracy, while allowing universities to fulfill their public service missions.

The economic crunch facing public universities today, however, suggests that it is not realistic for research universities to fill the void created by broadcast journalism self-censorship. Financial resources like those of the networks, are not available at most public universities for conducting in-depth investigative journalism on a consistent basis. Thor-

390. ERNEST L. BOYER, SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORATE 3 (1990). Boyer observed that "colleges and universities are being asked to account for what they do and to rethink their relevance in today's world." *Id.* at 76.

391. Rosen, *supra* note 388, at 363.

392. See generally Jeremy Cohen & Dennis F. Kinsey, 'Doing Good' and Scholarship: A Service-Learning Study, JOURNALISM EDUCATOR, Winter 1994, at 4 (providing an explication and example of service learning). Cohen and Kinsey define service learning as "learning that combines public service with related academic work." *Id.* There is "no single definition," however, of the term. *Id.* at 5. Ultimately, service learning must have "explicit links to scholarship, and it must respond to explicit community needs." *Id.* at 6.

ough investigative journalism takes time, often a substantial sum of money, and increasingly, in the realm of broadcasting, equipment such as hidden cameras and microphones.

Furthermore, there is a difference between *generating or producing* solid examples of investigative reportage and *disseminating* that product on a widespread basis. Even if university-sponsored, classroom-produced investigative reporting occurs, it does not provide a valuable service to the community if it remains closeted in the classroom. Investigative articles and stories must see the light of day and reach the community before they can help a university to better fulfill its community service function.

A different, more expansive role for in-house university press services and publications would be required to fulfill a new dissemination function by universities. That, however, costs money—a scarce resource at many universities today. Nevertheless, distribution of such information via resources such as the World Wide Web is feasible and inexpensive. Student-produced, faculty-sponsored projects can be posted for minimal expense on a university's home page on the Web. The circulation and distribution of such information would be substantially less, however, than if the same story were broadcast on a television news magazine such as ABC's *20/20*.

In considering this expanded role for the university, another problem that must be addressed is the danger posed by internal conflicts of business interests at a university. For instance, a professor-directed journalism course investigation that is critical of expansion and growth in a once-small university town may run counter to that university's own interests in development. Conflicts such as this raise questions of self-censorship very similar to those at the networks. Moreover, some issues may simply be too controversial for dissemination by university press services and on university home pages.

A further issue, a very relevant one for tenure-track faculty, is whether the production of investigative pieces would count toward the tenure process. Without increased incentives for undertaking a new role, the odds of a university replacing an investigatory function once served by broadcast media are slim. An in-depth investigation produced by a professor's journalism class provides a community service function, but it may not increase that professor's chance of obtaining tenure. Incentives must be supplied by schools if universities are to play an expanded role in investigatory journalism.³⁹³

393. See generally Chris Hammond, *Integrating Service and Academic Study: Facul-*

A resolution of these issues goes beyond the scope of this Article. This Article raises them instead for the purpose of generating thoughtful consideration and debate. The contrast between the University of California's actions and those of ABC and CBS suggests the potential for an increased service-action role in investigative journalism by public universities. The possibility cannot be ignored. It may be that universities, however, are ill-suited to fill the growing information void left by broadcast news organizations.

If universities do not fill the role, a question still remains. Who or what entity will play that role? This question is critical, complex, and requires serious debate and dialogue. Unfortunately, this discussion is not occurring. As Todd Gitlin stated, "[T]he [media] mergers are taking place amid a deafening silence."³⁹⁴

III. CONCLUSION

The University of California's in-court victory over Brown & Williamson provides the powerful lesson that tobacco companies are not invincible in judicial settings. Judge Pollak's decision also signalled a victory for the public, academic freedom, and plaintiffs involved in current and future litigation against the tobacco industry. The documents are now available for all to see and download via access to UCSF's World Wide Web home page.³⁹⁵

The lesson that fighting the tobacco industry may pay public service dividends, however, may be lost on broadcast news organizations such as ABC and CBS which are apparently more concerned with shareholder dividends. Increasing conglomeration compounds the problem. Even if the broadcast news media press could legally disseminate material like that in *Regents of University of California* under the court's decision, the question still arises whether it nonetheless would refrain from publishing the information for fear of potential liability based on its content. The University of California fought back against what this Article suggests was a SLAPP suit intended to stifle informed discussion on regulating the cigarette industry and its products.

The case also teaches lessons about the use of the World Wide Web as a litigation weapon. Publication of documents on the Web increases the likelihood of circumvention of discovery rules and the defeat of litigation and evidentiary privileges. Although it is easy to attack the cigarette

ty *Motivation and Satisfaction in Michigan Higher Education*, 1 MICH. J. COMMUNITY SERVICE LEARNING 21 (1994) (studying motivation and satisfaction of faculty who utilize service learning).

394. Gitlin, *supra* note 35, at 6.

395. See *supra* note 4.

industry for hiding the documents from the public, the University's use and threatened use of the Web to display those documents is problematic.

Finally, this Article suggests that major public and private universities may be the entities necessary to fill the information vacuum created by self-censorship at major corporate news organizations. An ideal service learning opportunity presents itself.³⁹⁶ Numerous obstacles currently stand in the way of such an increased action-service role for universities and, in particular, for the journalism programs and departments within those universities. The idea, however, cannot be ignored. Discussion and dialogue must replace silence in the face of increasing conglomeration of the news business.

396. See generally Dwight E. Giles, Jr. & Janet Eyler, *The Theoretical Roots of Service-Learning in John Dewey: Toward a Theory of Service-Learning*, 1 MICH. J. COMMUNITY SERVICE LEARNING 77 (1994) (providing an excellent explication on the theory of service learning).

